FIRST QUARTER 2017

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KENTUCKY

PENAL CODE

PENAL CODE – KRS 514 - THEFT

Tolar v. Com., 2017 WL 65601 (Ky. App. 2017)

FACTS: In a complicated scheme, Calvin Tolar took on his brother, Melvin's identity to borrow large sums of money to start a business. Specifically, he borrowed money from U.S. Bank in Kentucky under Melvin's name, through several loans.

Tolar stood trial in 2015, during which several bank representatives testified as to various loans and the amounts which had been defaulted in each, to a total of approximately $50,000. Tolar was convicted and appealed.

ISSUE: Does misrepresenting oneself for the purpose of getting a loan (and defaulting) constitute Theft by Deception?

HOLDING: Yes

DISCUSSION: Tolar argued there was no evidence he intended to deceive U.S. bank or deprive it of funding. The Court noted he specifically represented himself as his brother, but Melvin testified that they were never even in business together. The Court agreed that under the crime of Theft by Deception, all of the elements were met.

Woods v. Com., 2017 WL 1052287 (Ky. App. 2017)

FACTS: In 2011, Woods had written a check to her landlord on a closed account. She was charged and convicted of Theft by Deception. She appealed.

ISSUE: Is writing a bad check to obtain something you are already in possession of Theft by Deception?

HOLDING: No

DISCUSSION: Woods argued that she lacked the necessary intent to deceive when she provided the check. The Court noted that she obtained her interest as a tenant some three weeks before she handed over the check and as such, Woods already had possession of the property. The Court agreed the conviction was improper and reversed it.

PENAL CODE – KRS 520 - ESCAPE

Hughes v. Com., 2017 WL 129082 (Ky. App. 2017)

FACTS: In 2015, Hughes was given furloughs from the Nelson County Detention Center to attend DUI classes, not far from the jail. He did not appear on time and ultimately, was reported to be missing to Bardstown PD. Later that evening, the officers learned of a possible location for Hughes, a restaurant. Officers Riley and Officer Cauley positioned themselves near the location, monitoring exits, while two officers entered to locate Hughes. He left through the back door and was spotted by them, and ran when ordered to stop. Following a struggle and a foot chase, he was captured.
Hughes was charged with a variety of offenses, including Fleeing and Evading, and Escape 2nd. He was convicted of the latter (which was severed from the other charges) and appealed.

ISSUE: Is failing to return to jail after a temporary release Escape 2nd?

HOLDING: Yes

DISCUSSION: Hughes argued that he "fully intended to return" to the jail but had "unintentionally consumed alcohol or drugs" and could not do so. He claimed a friend gave him a soft drink and in hindsight, it believed it was laced with something. He claimed to remember little to nothing until he was tased and apprehended. He claimed he was running back to the jail.

The Court agreed that his failure to return was Escape 2nd. The Court then looked to whether he was entitled to an instruction on intoxication, and whether it prevented him from forming the intent not to return. However, the only testimony about his alleged intoxication was from Hughes himself – and that there was no evidence either to support it.
The court upheld his conviction.

DUI

Com. v. Crosby, 2017 WL 1101127 (Ky. App. 2017)

FACTS: On April 6, 2014, Officer Ingram (Oldham County PD) responded a vehicle parked on the side of the road with the engine running. He found "Martin slumped forward behind the wheel of her vehicle smoking a cigarette and texting on her phone." The officer believed she was DUI. Martin failed FSTs and was arrested; she was determined to have a BA of .181.

At the hearing to consider her OL suspension, Martin argued that she was not in physical control of her vehicle at the time. That was referred to a suppression hearing. At that hearing, testimony indicate that Martin was sitting in a parked vehicle that had its lights on and the engine running. Martin argued that she was simply sitting in her vehicle to smoke. There was

disagreement over what she said to Officer Ingram, she stated she'd indicated she was staying down the road and didn't intend to drive, and the officer saying she said nothing about that and that she said she "lived" down the road, which was not the case according to her OL. (In fact, she'd been at a party at the indicated location.) She had her purse with her, as well.

The trial court ruled that the Commonwealth did not meet its burden of proof and suppressed all evidence. It terminated the pretrial license suspension as well.

The Commonwealth moved for a writ of prohibition /mandamus, arguing it could not try the case without the evidence. Upon appeal, the Circuit Court upheld the suppression under the Wells[1] factors. The Commonwealth appealed.

ISSUE: Must the Wells factors be used in deciding if a person is asleep or passed out for a DUI?

HOLDING: Yes

DISCUSSION: The Court looked to Wells, which lays out the four factors to consider in determining whether an individual had physical control of a vehicle while intoxicated. Under Wells, the following need to be considered:

> (1) Whether or not the person in the vehicle was asleep or awake; (2) whether or not the motor was running; (3) the location of the vehicle and all of the circumstances bearing on how the vehicle arrived at that location; and (4) the intent of the person behind the wheel.

In this case, Martin was awake and her vehicle was running. It was located on the side of the road, with all four wheels on the road, with the lights on. Martin had her purse with her as well. The Court noted that most of its previous cases focused on whether the vehicle was or the status of the driver (asleep or passed out). This case was different in that the "focus is on whether Martin in returning to her vehicle after becoming intoxicated, had a current intent to drive." The fact that the vehicle was successfully parked infers she was not intoxicated at the time she arrived. At the time the officer saw her, she was "smoking, texting and stating that she was at a party and did not intend to leave."

The Court affirmed the suppression.

CONTROLLED SUBSTANCES

Com. v. Kenley, 2017 WL 1034546 (Ky. App. 2017)

[1] Wells v. Com., 709 S.W.2d 847 (Ky. App. 1986)

FACTS: On December 6, 2014, Kenley was incarcerated in the Fayette County Detention Center. She suffered an apparent overdose. Jail personnel, during the response, found a quantity of Fentanyl in Kenley's pocket. She was treated for the overdose. She was then indicted for Promoting Contraband 1st, under KRS 520.050(1)(b), the "possesses" clause. She moved to dismiss, arguing that KRS 218A.133, the amnesty provision, applied. The trial court granted the motion and the Commonwealth appealed.

ISSUE: May Promoting Contraband be charged even when prosecution is prohibited under the amnesty provision?

HOLDING: Yes

DISCUSSION: The sole issue before the court was "whether KRS 218A.133 prohibits prosecution under KRS 520.050(1)(b)'s possession-of-dangerous-contraband provision when that dangerous contraband is a controlled substance."

The Court acknowledged the mandate to liberally construe a statute for its intent and the need to reconcile the two statutes, if necessary. The Court however, noted that KRS 218A.133 prohibits charging a person with the crime of possession of a controlled substance but specifically does allow prosecution for any other applicable crime. The Court agreed that Promoting Contraband is a different crime and that the law exists to protect those inside the detention center. Exempting her from prosecution would not forward the public policy behind the immunity provision and endangered other people, not just herself.

The Court reversed the decision of the trial court and remanded the case.

Hughes v. Com. , 2017 WL 544627 (Ky. App. 2017)

FACTS: On August 27, 2014, Hughes sold ten capsules of heroin to a CI. She was charged with TICS 1st under the 10 or more dosage units. Hughes argued to amend the indictment, as the quantity of heroin was less than 2 gram. When that was denied, she took a conditional guilty plea, and appealed.

ISSUE: Is heroin in pill form to be considered by weight or dosage unit?

HOLDING: Weight

DISCUSSION: The Court noted this was an issue of statutory construction, and reviewed the general rules of such. Looking at the statute within the framework of these rules, the Court looked to the statute in question and agreed that reading the statute as a whole, the General Assembly elected to exclude heroin from the provision concerning dosage units, and instead, classify it solely by weight. The Court noted that it is "logical to conclude" that the provision on dosage units was intended to include prescription drugs that are dispensed in prescribed amounts, not bulk weight. Since it would be absurd to say she sold both 10 dosage units – a

Class C felony – and less than 2 grams of heroin – a Class D felony, at the same time, the Court agreed that the weight of the heroin was controlling.

The Court reversed her conviction under the dosage unit provision.

FAMILY / DOMESTIC VIOLENCE

Calhoun v. Wood, 2017 WL 1034545 (Ky. App. 2017)

FACTS: Wood filed for an order of protection in Hancock County against Calhoun, whom she claimed had been "stalking and harassing" her for some two years. She denied having any romantic relationship with him, although he wanted such a relationship. Criminal stalking charges were also filed. She was awarded the IPO that was to be effective for six months (until December 28, 2016). Calhoun appealed.

ISSUE: May an IPO be given for stalking?

HOLDING: Yes

DISCUSSION: First, the Court noted that, although the IPO had expired, it still had jurisdiction to rule on the case. Since "the purpose and intent behind, and the interpretation of, the DVO statutes are almost identical to that of the IPO statutes," a case dealing with a DVO could be used as interpretation.[2] In this case, the trial court had agreed that Calhoun had, in fact, stalked Wood, and that "under the IPO statutes, the term "'[s]talking' refers to conduct prohibited as stalking under KRS 508.140 or [KRS] 508.150." KRS 456.010(7)." The unrefuted acts indicated the second-degree stalking had been met. The Court agreed that the IPO had been properly issued.

RESTITUTION

Wombles v. Com., 2017 WL 652138 (Ky. App. 2017)

FACTS: Wombles pled guilty to an assortment of theft related charges in Jefferson County and agreed to pay restitution. For six of the victims, the amount was known, but two were left to be determined. After a hearing, the amount due to one of those two was calculated to be approximately $64,000, bringing the total amount of restitution owned to approximately $100,000. (The final victim did not appear to press for restitution.)

Wombles appealed the amount.

ISSUE: Must restitution be commensurate with actual loss?

[2] Caudill v. Caudill, 318 S.W.3d 112 (Ky. App. 2010).

HOLDING: Yes

DISCUSSION: The Court agreed that the court's calculation of the restitution owed in effect allowed the victim to be compensated for expenses that were incurred separate from Womble' crime, in effect, putting her in a better position, rather than equal position, a windfall.

The Court reversed the decision and remanded the case.

SEARCH & SEIZURE

SEARCH & SEIZURE – CONSTRUCTIVE POSSESSION

Madison v. Com., 2017 WL 129077 (Ky. App. 2017)

FACTS: Det. Paige (Lexington PD) along with a USPS Inspector, Erhardt, intercepted a delivery of marijuana and followed it to the delivery address. Det. Paig spotted a vehicle, with a driver, sitting in it near that residence. Agent Erhardt, driving the delivery vehicle, got out and approached the location with the package and the individual in the vehicle approached the agent; that person was White. White made a phone call then accepted the package. Agent Erhardt motioned for Paige to step in. As he did so, White opened the package.

At that point, under police supervision, White placed calls to Madison on speaker phone, which were recorded. Madison first told White to take the package to Madison's house – but he was then told to bring it to where Madison worked, a local grocery. He was advised Amanda would accept it there, and that she would be wearing black pants.

At the store, Amanda Amburgy approached to accept it. She was detained by the officers and questioned – she indicated she didn't know what was in the package but was only asked to fetch it. Madison then approached as well. The situation was explained and his rights were provided to him. He indicated he thought the package was furniture – but changed that to say it was a dog house.

Madison was charged with trafficking. He was convicted and appealed.

ISSUE: May a subject exercise control over a package they never touch?

HOLDING: Yes

DISCUSSION: Madison, who in fact had never touched the package, argued that he couldn't be held responsible for it. The Court agreed that his actions with respect to the package indicated that he "exercised dominion and control" over it to a sufficient extent to hold his legally responsible for it under constructive possession.

The Court affirmed Madison's conviction.

SEARCH & SEIZURE – DOG SNIFF

Moffett v. Com., 2017 WL 1041303 (Ky. App. 2017)

FACTS: On October 10, 2013, soon after midnight, Deputy Thomason (Daviess County) made a traffic stop of a vehicle without headlamps. Moffett was driving. He learned that one of the passengers, Goodman, had outstanding warrants. The deputy was also familiar with the drug history of the other passenger. He requested a K-9 unit, which arrived in ten minutes. The dog alerted on the location where Goodman had been sitting, and drugs were recovered.

Moffett was charged with trafficking in marijuana and the traffic charge. He sought suppression, arguing that the traffic stop was prolonged. The trial court had agreed that the length of time was not unreasonable. It had noted that it would take some time to effect Goodman's arrest as well, during which time Moffett would not have been allowed to leave anyway. Their drug history added to the reasonable suspicion to hold the party as well.

Upon denial, Moffett took a conditional guilty plea and appealed.

ISSUE: May a traffic stop be extended with reasonable suspicion?

HOLDING: Yes

DISCUSSION: The Court agreed that unlike Rodriguez v. U.S. (2015), Deputy Thomason had reasonable grounds to prolong the stop, and in fact was "fully justified."[3] The Court noted that the entire duration of the stop was only 23 minutes as well. This was more than sufficient for a diligent investigation.

SEARCH & SEIZURE - STANDING

Coleman / Chestnut v. Com., 2017 WL 244086 (Ky. App. 2017)

FACTS: Coleman, Chestnut and Clay were identified as being involved in a Fayette County robbery. On January 12, 2014, at about 10 a.m., Officers Laney and Toler (Lexington PD) spotted Clay and Chestnut walking down the street. When the pair saw the officers, they "began to walk faster, changed direction," and crossed the grass to an apartment complex. As Officer Toler got out, Chestnut fled, but Clay remained at the scene. Officer Laney pursued Chestnut in his cruiser. He lost sight of Chestnut but followed his footprints to an apartment door. When backup arrived, Officer Laney knocked and two women answered, Bates and Chestnut's sister, Melvina. Chestnut said her boyfriend was in the apartment and she would get him. When Officer Laney asked to come in, she agreed. As she walked toward the bedroom, he

[3] 575 U.S. --- (2015).

followed, finding Washington (the resident and Melvina's boyfriend) in the bed and Coleman standing near the closet, as well as marijuana in plain view. Washington denied it was his and refused consent to a further search.

Officer Laney brought everyone to the living room. Another officer found Chestnut hiding under a blanket during a protective sweep. Officer Laney requested and obtained a search warrant. More marijuana was found in the apartment, along with a number of items determined to have been stolen in a robbery. The vehicle taken in that same robbery was found in the parking lot. A separate search warrant was obtained for those items and the victim identified Clay and Chestnut as the robbers. He was less certain about Coleman, however.

Washington was the leaseholder for the apartment, and Melvina Chestnut lived there as well. Coleman gave an out of town address but said he was homeless. He "had an understanding" that he could crash on the couch at the apartment if necessary, and had been doing so when Laney arrived. Melvina stated the next day that her brother lived in the second bedroom of the apartment, but she did not tell the officers that on the day of the search. The Court denied the motion to suppress, finding that none of the three had standing to challenge the officers' initial entry. Clay never claimed that he lived there and Coleman was at best, and occasional overnight visitor, with no expectation of privacy beyond the living room. Chestnut had never been identified as living there at the time of the search and in fact, there was no evidence of it beyond his sister's statement. The Court found Melvina consented and did not object to the officer following her but agreed that his entry into the bedroom likely exceeded the scope of the consent. The Court also questioned the sweep, but agreed that given neither man had standing, it was a moot issue.

Coleman and Chestnut took conditional pleas to facilitation to commit robbery and appealed.

ISSUE: Does an occasional overnight guest have an expectation of privacy in a residence?

HOLDING: No

DISCUSSION: The Court noted that the first hurdle for the Coleman and Chestnut was proving they had an expectation of privacy in the apartment. Coleman did not have a key, did not contribute to the household and kept no belongings there. The evidence concerning Chestnut came solely from his sister, and in fact, he had never claimed to live there himself. As such, neither had standing to contest the search.

The pleas were upheld.

SEARCH & SEIZURE – CONSENT

Shelton v. Com. , 2017 WL 243460 (Ky. App. 2017)

FACTS: On June 10, 2014, Troopers Jodry and Whalen (KSP) discovered that Rose had purchased pseudoephedrine that day in Carroll County. She'd previously been blocked by the system for making a purchase. They discovered that she was likely with Shelton and that Shelton and his wife had extensive purchase histories. They decided to do a knock and talk at the Shelton residence.

The troopers, along with a third trooper named Gosser, took separate vehicles to the residence. The driveway leading to the Shelton property split into a Y-intersection, with a house at the end of the right fork, and a garage at the end of the left. As Trooper Jodry drove up the driveway, he saw Dana walking from the garage area toward the house; however, the record is clear that Trooper Jodry did not see Dana actually exit the garage. Dana informed Trooper Jodry that Ricky was in the garage. By this time, Troopers Whalen and Gosser had already gone up to the garage and, without entering, yelled into the garage asking Ricky to come out. When he did, the troopers advised Ricky that they believed that he may be manufacturing methamphetamine in the garage and asked for consent to search. Ricky refused consent until he was able to speak with his attorney. At the suppression hearing, Trooper Jodry admitted that at that time they had only the national precursor logs indicating that Ricky and Dana had made past pseudoephedrine purchases, which would not have been sufficient to obtain a search warrant.

The troopers learned that Dana Shelton was on parole and had an outstanding warrant. They contacted her parole officer, Warrant, who was informed of Dana's presence, and Warren arrived with the warrant. "When Warren arrived the troopers informed her that they had information that there was an active methamphetamine laboratory in the garage that Dana had been purchasing pseudoephedrine, and that Ricky had refused consent to search the property. Based on that information Warren asked the troopers to search the garage."

> Warren later testified to her belief that all parolees are subject to being searched without a warrant at their property, which she considers any property to which the parolee has access. Dana had listed her address with the parole office as 205 Highway 36 West, the property on which the primary residence is located. While no one had seen Dana accessing the garage, Warren believed that Dana did have access to it by analogizing the situation to her own experience: Warren stated that her husband claims their garage as his own, yet Warren considers herself to have access to it. The troopers searched the garage at Warren's instruction and discovered an active methamphetamine laboratory in a 20-ounce plastic soda bottle located in an office area in the back of the garage.

Ricky Shelton was charged with manufacturing and moved for suppression, arguing that the evidence was found in the garage, which bore a different address than the residence itself. In fact, both structures stand on an undivided 12 acre lot, shared by Ricky and his brother Randy. The deed provides two different street addresses for the brothers, both located on the same acreage, and there is only one mailbox. "In other words, the property seems to have originated as a single parcel that acquired a second address through usage, rather than being subdivided into separate lots."

The suppression motion was denied. Ricky Shelton took a conditional guilty plea and appealed.

ISSUE: Does an individual lose some expectation of privacy when they share a residence with a parolee subject to supervision?

HOLDING: Yes

DISCUSSION: The Court noted that:

> The circumstances surrounding the warrantless search of the garage at 200/205 Highway 36 West, Carroll County, Kentucky are thoroughly muddled by the uncertain legal status of the property upon which the garage sits. What is certain, however, is that at the time the garage was searched the only articulable ground for doing so without a warrant was Dana's status as a parolee. Thus, the core question on appeal is how far the effect of Dana's parolee status should reach. Ricky maintains that the garage is completely separate from the residence that Dana claims on her parole paperwork – it is listed as a separate address, is jointly owned by Ricky and his brother, and is separated from Dana's listed residence by 50 yards - and that Dana does not have enough "control" or "access" to make the garage subject to the conditions of her parole agreement. On the other hand, the Commonwealth argues that it is all the same legal property and that Dana had control and access to all of it, therefore making the warrantless search valid.

The trial court had looked to Bratcher v. Com., "in which the Kentucky Supreme Court follows principles outlined by the United States Supreme Court in Samson v. California,[4] to arrive at the conclusion that "the Fourth Amendment presents no impediment against a warrantless and suspicionless search of a person on parole."[5] However, that applied to Dana, not Ricky.

Although the trial court spent a great deal of time examining the issue of control, using a title search and aerial photos, "In the context of search and seizure cases, the relevant inquiry is whether the officers *reasonably* believed that Dana had sufficient control over the garage.[6] However, because it would never expect or require officers to go to that extent, it reasoned that it "should not spend too long on these types of technical issues in examining the question of control. Instead, we should view the facts as closely as possible through the same lens as the officers did at the time of the search. Here, the garage appeared to be located on the same property as the marital home; Dana was observed by the officers coming from the area of the garage when they arrived; and, there was nothing about the garage that indicated that it was used only by Ricky or that Dana did not have common control and authority over it."

The complexity arises, however, because Dana, rather than Ricky, was the one charged with the lab. "Put another way, it is not Dana's privacy interests that matter here —rather, it is the privacy interests of her co-inhabitant that are of consequence to this case. And, the issue that must be decided in this case is whether any implied consent that could be inferred by Ricky's

[4] 547 U.S. 843 (2006).
[5] 424 S.W.3d 411 (Ky. 2014).
[6] Perkins v. Com., 237 S.W.3d 215 (Ky. App. 2007).

co-habitation with a parolee was overridden by his express objection to the search of the garage he was occupying when police arrived at his home."

For many years, the general rule was that consent by one resident of a jointly occupied premises was sufficient to justify a warrantless search.[7] However, in Georgia v. Randolph, the Supreme Court reiterated a narrow exception to this consent rule, holding that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."[8] "A warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." "Kentucky courts must follow the rule in Randolph that an occupant's voluntary consent to a warrantless premises search is ineffective to bind he co-occupant who is physically present and who objects to the search."[9] Ricky appears to meet the Randolph requirements. He was physically present in the garage when the police asked to search it and he unequivocally refused to give his consent. The Commonwealth does not contest these facts. Its argument is simply that the Fourth Amendment was not violated because Dana agreed to the search as part of her parole. Of course, as we have already set forth the fact that the search did not violate Dana's rights does not mean that it was proper as to her husband, a present and objecting individual who was neither on parole nor probation.

The Court moved on to the next issue: could it "infer consent or a lesser expectation of privacy from the fact that Ricky was living with a parolee." The reasoning underlying the Supreme Court's view that parolees and probationers have a diminished privacy interest appears not to apply to individuals with whom they live. Parolees and probationers have a low expectation of privacy because their liberty is conditional and because the government "clearly expressed" to them that they were subject to warrantless searches, and they acknowledged this "unambiguously." Neither the parties nor the circuit court addressed whether Ricky was aware of Dana's status and the fact that it allowed police to search their residence."

Unlike Randolph, however, in this case "Dana was not cooperating. Her consent was obtained because of her status. Police had a right to search her belongings and the areas in her control without a warrant, even if she objected to them doing so. In essence, she gave police a form of irrevocable consent. Therefore, regardless of Ricky's objection, the police had the right to search the garage as related to Dana. While they did so over Ricky's objection, their conduct may have been reasonable even as to Ricky, if Ricky knew about his wife's status and the fact that their home was subject to search. It is difficult to see how Ricky would have a reasonable expectation of privacy *if* he knew that the marital home was subject to search at any time due to Dana's parole."

Since the record, however, there was no indication whatsoever whether Ricky Shelton knew of his wife's status "and its effect on their residence." The court remanded the case for further proceedings to determine that issue, and a resolution as to whether "Ricky had a

[7] See U.S. v. Matlock, 415 U.S. 164 (1974).
[8] 547 U.S. 103 (2006).
[9] Payton v. Com., 327 S.W.3d 468 (Ky. 2010).

reasonable expectation of privacy in the common areas he shared with" her. The Court emphasized that his privacy rights are separate and apart from Dana's rights and expectation.

Lundy v. Com. , 511 S.W.3d 398 (Ky. App. 2017)

FACTS: Mark was shot, while at his home, by his wife Jill. (She claimed he was assaulting her with a bottle at the time.) He fled in his truck to get to the hospital, while Jill called 911. Officers who arrived found a quantity of marijuana, and Mark Lundy was charged with trafficking and related offenses. He moved to suppress.

At the hearing, Nelson County officers who responded to the call testified. Deputy Voils, who arrived first, stated that he told her he needed to come in to get the weapon, which she'd left on the kitchen table, and she agreed. He found an unloaded revolver but took no further action inside at the time. Det. Snow arrived and when he was informed as to what had happened, contacted Det. Allison to get a warrant. He also observed blood outside. A warrant was issued that authorized seizure of "firearms and ammunition, firearm accessories, shell casings, projectiles, wine bottles and any blood evidence." In the kitchen, officers found a quantity of marijuana, with more in the locked deep freezer in the garage. In an outbuilding, they found a grow operation under the floor, and they contacted the Hardin County Narcotic Task Force to handle that. Ultimately almost 400 plants and assorted items were found in the search, and the task force took a number of items as "goods purchased with drug proceeds." They seized a safe, got another warrant, and found pills and guns inside.

The trial court ruled that Jill consented to the entry and that the places searched were covered by the warrant for the shooting investigation. However, the court agreed that "once the law enforcement officers' search for evidence relevant to the shooting investigation was complete, the search should have ceased. It concluded that the Task Force's search of the premises without an additional search warrant was unconstitutional and all evidence discovered and seized by the Task Force in the second search was suppressed. The Commonwealth appealed.

ISSUE: With a warrant, may an officer search anywhere the item might be?

HOLDING: Yes

DISCUSSION; The Court looked to the issue of consent. "Mark contends that even if Jill consented to Snow's initial entry into the residence to secure the weapon used to shoot Mark, she did not consent to the search of the locked freezer or outbuilding. His argument is not well taken. Snow did not search the premises upon his initial entry. He merely entered the home, secured the weapon, and returned outside. The search that revealed the marijuana was pursuant to a warrant, the validity of which Mark does not dispute.

> The scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found."[10] The Ross Court held that a lawful search is not "limited by the possibility that separate acts of entry or opening may be required to complete the search." An otherwise valid search is transformed into an impermissible general search only where the searching officers demonstrate a "flagrant disregard for the limitations of a search warrant[.]"[11]

The Court looked to Hazel v. Com., in which an officer with a warrant for one thing opened a drawer and found evidence of a completely unrelated crime. [12]

> The warrant issued to search Mark's premises authorized officers to search for "firearms and ammunition, firearm accessories, shell casing, projectiles, wine bottles and any blood evidence" in the home, garage and outbuilding. The items specified in the warrant were small in size and the officers were authorized to search anywhere those items might reasonably be found and unlock anything that might contain those items. The trial court properly denied Mark's motion to suppress the marijuana found in the locked freezer and outbuilding.

On an unrelated note, Mark also argued that what he had was hemp, not marijuana. Both, however, involve the same plant, cannabis sativa. The Court assessed the current state of the law involving marijuana and hemp. The court noted that under Kentucky law, he could only possess industrial hemp with a license, which he did not have, so differentiating between them was unnecessary. Other evidence suggested that he was growing marijuana, not hemp, and that was his intent.

Lundy's conviction was affirmed.

SEARCH & SEIZURE – CURTILAGE

Holt v. Com. , 2017 WL 65599 (Ky. App. 2017)

FACTS: On July 7, 2014, at approximately 1:30 a.m., Officer Deibler (Morganfield PD) and two other officers were dispatched to a disturbance at Holt's apartment complex. They learned that "Holt had been engaged in a heated argument, that he kicked a car door, and that he then hurriedly left." Officers went to his apartment, which was actually a ranch style duplex, which each apartment having a small grassy area in front that they used for flowers, lighting and outdoor furniture. There, "Officer Deibler left the sidewalk leading to Holt's front door, walked across the front yard, and peered into Holt's bedroom window." The window was located about seven feet from the sidewalk, and the window itself was shielded by mini-blinds in a slanted but slightly open position. Because of his position near the window and his height of 6 feet 10 inches, Officer Deibler was able to peer at a downward angle through the blinds directly into Holt's bedroom.

[10] U.S. v. Ross, 456 U.S. 798 (1982).
[11] U.S. v. Lambert, 771 F.2d 83 (6th Cir. 1985).
[12] 833 S.W.2d 831 (Ky. 1992): see also Evans v. Com., 116 S.W.3d 503 (Ky.App. 2003).

From this vantage point, Officer Deibler was able to see Holt handling a small box that contained a handgun. By means of whispers and hand signals, Officer Deibler communicated with the other two officers standing at the door to wait before knocking. After watching Holt handle the box for another minute or so, Officer Deibler directed the other officers to knock on the door. When they did so, Officer Deibler observed that Holt closed the box and placed it on the floor before leaving the room. He then saw a woman enter the bedroom. She picked up the box and tried to place it in a drawer.

Deibler went to the door and asked Holt about the gun. Holt readily agreed it had a weapon, and then turned to walk in the direction of the bedroom. The officers followed him there and watched him remove the handgun and give it to one of the others. The box included another wrapped object, and they asked what it was. He stated it wasn't his. Upon being pressed, he said it was a "glass" – a methamphetamine pipe – and unwrapped it. Nothing else was found and the gun itself was legally owned.

Holt was arrested for criminal possession of a controlled substance (residue in the pipe) and possession of drug paraphernalia. Holt moved to suppress, "arguing that Officer Deibler impermissibly invaded the curtilage of the apartment to observe the interior of Holt's bedroom from an unlawful vantage point in violation of his expectation of privacy. Officer Deibler was the only witness who appeared at the initial suppression hearing on September 8, 2014. He testified that his vantage point was no more than three feet away from the sidewalk and that he could have seen through the angled blinds even from the sidewalk." Holt's motion was denied. He moved to reconsider, introducing photos of the scene. It was acknowledged that the distance was about seven feet and that other residents "used similar areas in front of their apartments for flower beds." The Circuit court looked to U.S. v. Dunn,[13] and cited by Quintana v. Com.[14]) The circuit court found that "[a]s an apartment dweller the Defendant's right to use and enjoyment of the premises apply to the inside of the apartment and not to the outside," that the grassy yard appeared to be a common area, and that "[b]linds left partially opened with a light on when it is dark outside does [sic] not exhibit any expectation of privacy." Based on these considerations, the circuit court denied the motion to suppress, holding that "this case does not meet the standard of Quintana."

Holt took a conditional guilty plea and appealed.

ISSUE: Is the area directly in front of a window curtilage?

HOLDING: Yes (in most cases)

DISCUSSION: The Commonwealth argued Holt had no expectation of privacy in the area outside his unit and that the "mere existence of the gun in the apartment was sufficient to create an exigent circumstance based on officer safety, contending that Holt's action in walking toward his bedroom where the gun was located constituted an intervening act sufficient to purge any taint of a Fourth Amendment violation."

[13] 480 U.S. 294 (1987).
[14] 276 S.W.3d 753, 760 (Ky. 2008

The Court agreed that first, the home is sacrosanct, and that "central to any Fourth Amendment analysis is the issue of whether an individual had a 'reasonable expectation of privacy' with respect to the search."[15]

Looking to the knock and talk, it noted that:

> The knock and talk procedure is a helpful and commonly used police tool, often applied in situations as mundane as looking for a lost pet or to ask if the homeowner has seen a suspicious person in the neighborhood. In general, an officer knocking on the door to ask for citizen assistance is appreciated and the citizens are cooperative. However, that is not always the case, as some citizens desire privacy and to be left alone to the enjoyment of their home. Controversy may arise when the officer is not looking for assistance from the resident, but rather is using the procedure to look for evidence of wrongdoing by the resident, and approaches the home to ask for consent to search or to aid in spotting evidence in plain view or plain smell.[16]

The Court noted that:

> As an investigative procedure, "knock and talk" is subject to the limitation that an officer first is entitled to be on the property. "[T]he knock and talk procedure is a proper police procedure and may be used to investigate the resident of the property, *provided the officer goes only where he has a legal right to be.*"
>
> When an officer deviates from the usual path leading to the door, a separate issue of curtilage arises.
>
> The concept of curtilage began in common law, extending the same protection afforded the inside of one's home to the area immediately surrounding the dwelling.[17]
>
> In Oliver v. U.S., the United States Supreme Court recognized that the Fourth Amendment protects the curtilage of a house, and the area covered extends to that which an individual may reasonably expect to be treated as the home itself.[18] In contrast to curtilage, "open fields" are not protected under the Fourth Amendment, and the police may freely observe from them without restriction.
>
> Therefore, when a police officer departs from the direct path to the front door, it is essential to determine whether he is merely standing in the equivalent of open fields or whether he has penetrated and invaded the protected curtilage of the home.

To do so, Dunn must be applied.

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[15] Katz v. U.S., 389 U.S. 347 (1967).
"[A]n expectation of privacy is only reasonable where (1) the individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society is willing to recognize that subjective expectation as reasonable." Hause v. Com., 83 S.W.3d 1 (Ky. App. 2001).
[16] Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).
[17] U.S. v. Dunn, 480 U.S. 294 (1987).
[18] 466 U.S. 170 (1984).

> In Holt's case, the circuit court based its denial of the motion to suppress entirely upon the curtilage issue, which it analyzed exclusively under the four Dunn factors. The first factor: proximity. The circuit court observed that Officer Deibler was in an area that was "very close" to the home. Because Officer Deibler was adjacent (or nearly adjacent) to Holt's exterior wall, we may deduce that this factor weighed in favor of finding a possible invasion of curtilage. The second factor: enclosure. There was no fence, hedge, or other means of securing the front yard. Thus, from a perspective of lack of enclosure, the Commonwealth would appear to be on favorable footing. The third factor: how the area was being used. This element did not weigh strongly one way or the other. Testimony from Officer Deibler indicated that other residents in the apartment complex used their areas for flowers, lighting, or furniture. Holt conceded that he did not do so. The circuit court concluded that Holt's yard was a "common area" because he failed to plant flowers or otherwise decorate in the manner of his neighbors. We believe that the court erred as to that conclusion.
>
> The fourth factor: what a resident has done to secure his privacy. The circuit court found that "[b]linds left partially opened with a light on when it is dark outside does [sic] not exhibit any expectation of privacy." However, the blinds that the circuit court deemed "partially opened" might as reasonably be characterized as "partially shut." The strongest evidence that the blinds were sufficiently closed to secure privacy was demonstrated by the actions of Officer Deibler himself. He had the advantage of his considerable stature from the perspective of a sidewalk located seven feet from Holt's bedroom window. Nevertheless, in order to view the activity inside Holt's bedroom, an individual not clad in a uniform behaving in such a fashion could easily be charged with voyeurism.

The Court agreed that "The Fourth Amendment does not require us to live in windowless mausoleums to preserve our privacy interests, and the mere existence of a window does not give license to anyone -- not even an officer of the law -- to peep through its blinds or curtains."

> The curtilage is not, however, unassailable and license is given to someone approaching the front door, for example. However, a stranger outside one's bedroom window would be alarming during the day, and more so in the middle of the night, and "If a private citizen had conducted imself as Officer Deibler did in peeping through a bedroom window in the wee hours of the morning, the situation "would inspire most of us to—well, call the police."[19]

With respect to the gun, the Court noted that "firearms per se are not illegal." The officers could have simply asked him to stop and not walk to the bedroom, but "Instead, they let him proceed and then decided to search the room that they permitted him to enter without protest or warning." If there was an exigency, the Court agreed, the officers "effectively created it."

[19] Florida v. Jardines, 133 S.Ct. 1409 (2013).

The court vacated Holt's plea.

SEARCH & SEIZURE – TERRY

Duncan v. Com., 2017 WL 129076 (Ky. App. 2017)

FACTS: On November 17, 2014, Det. Terry (Meade County SD) received a tip from a CI that about a driver/vehicle that would be madding a delivery of cocaine to a Muldraugh, business. The CI provided the time (within an hour) and that the driver might have a gun. Det. Terry later testified that he'd used the CI before and he'd proved reliable.

Det. Terry spotted the vehicle and made a traffic stop, having observed a minor offense. Duncan, the driver, indicated he was on the way to the business that had been indicated, and that he was "acting nervous." He ordered Duncan out of the car, he complied reluctantly. Det. Terry patted him down, and felt a large bulge in a pocket. He believed it was narcotics – and upon being removed, it turned out to be 15 baggies of individually wrapped crack cocaine. Upon being more fully searched, he found six more bags and a bag of marijuana as well.

Duncan moved for suppression, and was denied. He was convicted of trafficking in a controlled substance and appealed.

ISSUE: Can an officer recognize a drug item through plain feel?

HOLDING: Yes

DISCUSSION: Duncan argued that the search conducted by Det. Perry violated the Fourth Amendment, and that it was not enough to do a Terry stop and frisk.[20] The Court agreed that the informant's tip was sufficient to justify the initial stop.[21] With respect to the removal of the drugs, the Court looked at "plain feel" and agreed it did apply in this case.[22] Det. Duncan's long experience was sufficient for him to reasonably believe what he touched was drugs.

The court also looked at a statement made by Det. Terry during his testimony, in which he stated that Duncan was "guilty of trafficking." The court noted that in fat, what the Detect said was "that based on his experience, the way the drugs were packaged was consistent with trafficking, not that Duncan was guilty of trafficking. Although the latter would have been unlawful, the former is not.[23]

After resolving several procedural issues, the Court affirmed Duncan's conviction.

SEARCH & SEIZURE – SNIFF

Knight v. Com., 2017 WL 729776 (Ky. App. 2017)

[20] Terry v. Ohio, 392 U.S. 1 (1968)
[21] Williams v. Com., 147 S.W.3d 1 (Ky. 2004).
[22] Com. v. Banks, 68 S.W.3d 347 (Ky. 2001).
[23] Sargent v. Com., 813 S.W.2d 801 (Ky. 1991); Kroth v. Com., 737 S.W.2d 680 (Ky. 1987).

FACTS: On January 16, 2015, Officer Sautter (DEA Task Force / Cincinnati Northern Kentucky International Airport) was asked by DEA in San Francisco about Knight's travel arrangements on January 17, 2015. He had purchased the ticket on that day, and purchasing a ticket the day before travel was a flag, due to San Francisco being a source city. Knight had a history of possession and drug trafficking. As a result, they planned to approach Knight when he arrived at the airport.

He was confirmed as a passenger, with two bags. Officer Minter secured the bags upon arrival as well as several other similar bags and allowed Faith, a drug dog, to sniff the bags. He alerted on Knight's bags. All of the luggage was then put onto the carousel.

Knight retrieved his bags. As he walked toward the exit, Officers Sautter and Minter approached and asked to speak to him – Knight agreed. He admitted he had marijuana and hash in his backpack. He gave consent to search the two checked bags, and they found marijuana, weighing just over 15 pounds. He moved to suppress and was denied, he took a conditional guilty plea for trafficking. He then appealed.

ISSUE: Is a brief holding of luggage for a sniff a violation of the Fourth Amendment?

HOLDING: No

DISCUSSION: Knight alleged that the seizure of his luggage initially, at the airport, for the drug sniff was improper. The Court agreed that the officers had sufficient reasonable suspicion to briefly "detain" the luggage and did not violate the Fourth Amendment. It was "brief, conducted out of public view and did not interfere with Knight's intended travel or his possessory interest in his luggage." Further, he then validly consented to a search after being informed of the dog's alert.

The Court upheld the plea.

SEARCH & SEIZURE – TRAFFIC STOP

Greer v Com., 514 S.W.3d 566 (Ky. App. 2017)

FACTS: On September 22, 2015, Officer Merker (Lexington PD) learned during his evening roll call that officers "should be on the lookout for various persons believed to be engaging in drug-related activity" in a particular area of town. Greer was mentioned by name, with a description and vehicle information as well.

At about 8:42, Officer Merker spotted Greer's vehicle. He could not see the driver, however, due to heavy window tint. Officer Nichols, the primary on the investigation, asked Merker to find a reason to make the stop, if possible, and Merker did so under the possible window tint

violation. As he approached the stopped vehicle, he detected the odor of raw marijuana. Greer was found to be driving. Greer was told the reason for the stop, but they could not confirm because Officer Merker's tint meter malfunctioned. As other officers arrived, Merker asked if there was marijuana in the car. Merker agreed there was, in the center console. During a further search, a loaded handgun was found in the glove compartment. (He was still unable to verify the possible tint violation.

Greer was charged with the tint, and arrested for the handgun, as he was a convicted felon. He was charged for possession of marijuana and driving in violation of his instructional permit. He was indicted on everything but the tint violation. He moved to suppress and was denied. He took a conditional guilty plea and appealed.

ISSUE: Are traffic stops like Terry stops?

HOLDING: Yes

DISCUSSION: Greer argued that there was no substantial evidence that his vehicle was improperly tinted, and called the individual who tinted the windows. He testified that he did the tinting in compliance with the law. The officer, however, testified that an overly tinted window made it difficult, if not impossible, to see the driver, and that was the case with Greer's vehicle. He had made a number of stops for tint and never been wrong, based on the meter. The Court agreed he had reasonable suspicion based upon his training and experience. Further, even if it was a pretext for the stop, Merker's "subjective intentions were irrelevant." A pretext stop is still a lawful stop.[24]

The court noted that traffic stops are like Terry stops, and must be based on reasonable suspicion at a minimum.[25] The Court agreed that once Officer Merker smelled the marijuana, he had probable cause to search the vehicle and the contents.[26]

The Court upheld the plea.

SUSPECT IDENTIFICATION

Williams v. Com., 2017 WL 464795 (Ky. 2017)

FACTS: In November, 2013, Williams and Gold (his roommate) "concocted a scheme" to steal marijuana from a fellow WKU student, Simcoe. They enlisted three others and then purchased items with which to do a home invasion. Three of the men donned masks, with Kennebrew and Gold, who knew Simcoe entering as invited guests. Simcoe assumed the pair were there to record music and smoke marijuana. Four other people were inside the residence at the time. Speer, one of the other guests, had already noted suspicious behavior by the pair,

[24] Com. v. Bucalo, 422 S.W.3d 253 (Ky. 2013); Whren v. U.S., 517 U.S. 806 (1996).
[25] Chavies v. Com., 354 S.W. 3d (Ky. 2011).
[26] Dunn v. Com., 199 S.W. 3d 775 (Ky. App. 2006).

and recognized one of the armed men who then rushed in as Williams, a fellow student. They robbed occupants of purses, computers, cell phones and marijuana. The men then left and split of the marijuana, hiding the other proceeds in the bedroom of an unwitting girlfriend. Another unwitting friend was given a computer to hold, and later, the Bowling Green PD retrieved it.

Simcoe reported the robbery immediately. Speer and Simcoe were taken to a WKU parking lot, and on the way, Speer was shown Williams' OL photo. She then identified Williams, Kennebrew and Stevenson.

Williams was convicted of Robbery and Burglary, and he appealed.

ISSUE: May a single photo be used to confirm an identification?

HOLDING: Yes

DISCUSSION: First, Williams argued that he should have gotten an instruction for Facilitation, but the Court noted that all of the evidence indicated he was a more active participant, rather than a disinterested individual. As such, the instruction was properly denied.

Williams also argued that the identification procedure was "improperly suggestive" by the showing of the OL photo.

The Supreme Court of Kentucky has found that there is nothing improper about a single photo identification used to confirm a previous observation or recollection:

> There's certainly nothing wrong with a witness being allowed to reaffirm the accuracy of her previous identification as long as that previous identification has not been impermissibly suggestive or tainted.[27] This reasoning supports the circuit court's determination that the driver's license photograph was merely "confirmatory, not suggestive." Speer's testimony was that, even before the police showed her the driver's license photograph, she recognized Williams as one of the masked assailants at the scene because she recognized his voice from class. The identification procedure in this case was not unduly suggestive. Even if the identification procedure were deemed suggestive, an identification may still be admissible if found to be otherwise reliable under a totality of the circumstances.[28] The five-factor analysis to assess the reliability of identifications comes from Neil v. Biggers[29]: "[O]pportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the

[27] People v. Jordan, 2003 WL 21277267 (Cal.Ct.App. Jun. 03, 2003) (finding that showing a witness a single photo of the defendant to confirm the witness's previous identification was not unduly suggestive); State v. Marsh, 187 N.C.App. 235, 652 S.E.2d 744, 747–48 (2007) (overruled on other grounds by State v. Tanner, 364 N.C. 229, 695 S.E.2d 97 (2010)) (holding that no due process violation occurred where single photo identification was based upon identifier's own observations and recollection and was requested only to confirm defendant's identity). Barnes v. Com. , 410 S.W.3d 584 (Ky. 2013).
[28] King v. Com.,142 S.W.3d 645 (Ky.2004).
[29] 409 U.S. 188 (1972)

witness at the confrontation, and the length of time between the crime and the confrontation."

Based on these factors, Speer's identification of Williams was undoubtedly reliable. She had a full opportunity to view and hear the masked assailants, and she was certainly paying attention to them as she was being given commands at gunpoint. Speer knew Williams's voice from class, and testified that she recognized it at the scene. She was absolutely positive in her identification, and her identification of Williams happened that same evening. We agree with the circuit court that the identification procedure was not unduly suggestive, being primarily in the nature of a confirmation procedure. Even if it were suggestive, however, the identification satisfies enough of the factors under *Biggers* to be considered otherwise reliable under a totality of the circumstances. Thus, we find no error

Williams' convictions were affirmed.

INTERROGATION

Booker v. Com. , 2017 WL 1102987 (Ky. App. 2017)

FACTS: On October 29, 2012, Johnson and Denny were robbed outside a Louisville convenience store. Johnson was shot and died. None of the people present could identify the robbers, but described the men. Det. Baker (LMPD) obtained surveillance video and it showed several people in the store at the same time as the victims. Still images were taken from the video, and beat officers identified Booker. She asked that the officers try to locate him to speak to her.

LMPD located him the next day and he agreed to be transported to speak to the detective. He was not restrained in any way. Det. Baker told him she believed he was a witness, and not a suspect. Everyone was aware that Booker was 15. Booker identified himself in the video but claimed he did not know who the other person he was seen with in the video. (He was even wearing the same sweatshirt.) Dets. Baker and Miracle left and then returned, and gave Booker his Miranda rights. He refused to sign a waiver form and stated he did not want to answer any more questions. He asked if they were going to take him home and if he could use the restroom. They arranged for both. He was returned to the interview room to wait and Det. Shingleton came in and asked him if he would answer a few more questions. Booker refused and asked to leave. He was finally transported back to Shorty's at his request.

About a week later, they decided to speak to him again. Again, patrol officers located him and he agreed to come to headquarters. At that time he was told that there was an eyewitness who stated that Booker was the shooter. He was given rights again and signed the waiver form, and questioned. He was taken home.

Booker was arrested almost a year later for complicity to Robbery and Murder. He was moved to adult court and demanded suppression of his statements. The trial court determined he was not in custody during either interview and denied suppression.

At trial, a witness, Benton, testified that she recognized Booker, although she did not name him that first night. She claimed she had called the detectives a few times afterward and identified Booker then. The defense asked for any other statements made by the witness to the detective and were told none existed. Upon further testimony, she clarified that she'd identified Booker as being presence, but not that he was directly involved in the crime. She apparently called several times after seeing Booker "out in the neighborhood" and that she was scared. Her testimony about having communicated with the detectives multiple times (which was not in the record) drew an admonition. At closing, the defense pointed out her inconsistent testimony.

Booker was convicted of complicity to Robbery and appealed.

ISSUE: Is a child's age a factor in determining voluntariness under Miranda?

HOLDING: Yes

DISCUSSION: Booker first argued he was in custody at the first interview, prior to being giving Miranda. The Court noted that under N.C. v. Com., the child's age could be a factor in determining custody.[30] The court further noted other factors often used in making the decision.

At the time of the initial interview, Booker was 15, but had "notable prior experience" in the criminal justice system. He was informed he was not under arrest, willingly accompanied the officers and was never restrained. He was told he was a potential witness. The tone was calm and conversational. He clearly understood he could refuse (and did) and asked to go home. In the second interview, he again willingly accompanied officers and this time signed the form. He also pointed to a technical violation of KRS 610.220 as his second interview lasted 2 hours and 14 minutes.

The Court agreed that in both situations, the interview was voluntary and there was no "overbearing influence or inappropriate questioning." Further, the Court noted that the statute only applied when the child was in custody, and that in both interviews, he was not in custody. In fact, officers were under no obligation to even provide Miranda or obtain a waiver.

Finally, the Court agreed that while the inculpatory statements should have been provided, the defense was able to use the admonition and the disclosure did not impact Booker's defense.

The Court affirmed the decision.

[30] 396 S.W.3d 852 (Ky. 2013); JDB v. North Carolina, 564 U.S. 261 (2011); In re Gault, 387 U.S. 1(1967).

Madry v. Com. , 2017 WL 1041264 (Ky. App. 2017)

FACTS: Det. Franklin (Louisville Metro PD) was sent to the emergency room to interview Madry, who had just arrived with a gunshot wound. Although Madry was in pain and "cried out frequently," Det. Franklin found he could "converse normally," and did not appear to be under the influence of any substance. Madry claimed he taken the gun away from a young boy, and as he put it in his pocket, it discharged, striking him in the thigh. He then dropped the pistol and he presumed it was still there.

Det. Franklin questioned the driver of the vehicle that had transported Madry and he began to have doubts about Madry's story. He returned to interview Madry, who insisted he'd been shot by accident. No gun was found in the area, nor any evidence of a shooting. The police searched the vehicle which had been used to bring Madry to the hospital and three pounds of marijuana were found.

Madry was charged with possession of a handgun by a convicted felon and trafficking in marijuana. He moved to suppress the statement and was denied. He was convicted on the weapons charge, the drug charge having been severed, and he appealed.

ISSUE: Is being questioned while in pain (and not in legal custody) coercive?

HOLDING: No

DISCUSSION: Madry argued "that the statements he made to Detective Franklin were involuntary because he was in pain and unable to escape or resist the detective's questions because of his ongoing medical treatment." The Court looked to the factors relevant in assessing voluntariness, noting that ""both the characteristics of the accused and the details of the interrogation" are considered.[31] With respect to the characteristics of the accused, "reviewing courts consider such factors as age, education, intelligence, and linguistic ability."[32] "Factors relevant to a characterization of the interrogation include the length of detention, the lack of any advice to the accused concerning his constitutional rights, the repeated or prolonged nature of the questioning, and the use of overtly coercive techniques such as the deprivation of food or sleep, or the use of humiliating tactics." Of course, "[u]se of a totality of the circumstances analysis embodies this belief that voluntariness cannot '[turn] on the presence or absence of a single controlling criterion' but rather a 'careful scrutiny of all the surrounding circumstances.'"

The Court noted that Det. Franklin did not have Mabry in custody, although certainly, the hospital would have tried to keep him from leaving. However, "a statement is not involuntary—the suspect's will is not always overborne—simply because he is questioned while in pain."[33] The Court noted that law enforcement may not prolong or increase the pain, or suggest that the pain will be alleviated only if the subject cooperates. But, that was not the case with Mabry, as he was able to communicate and his medical treatment was not interrupted.

[31] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[32] Bailey v. Com., 194 S.W.3d 296 (Ky. 2006).
[33] Dillon v. Com., 475 S.W.3d 1 (Ky. 2015).

The Court affirmed the denial of the suppression motion. The Court also addressed the issue that in fact, no specific gun was every produced and shown to have been in Mabry's possession. The only evidence of a gun was his "own uncorroborated statement" that he had it. The Court, however, agreed that his wound and damage to his clothing was enough to corroborate his statement.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – CRAWFORD

Birri v. Com. , 2017 WL 836946 (Ky. App. 2017)

FACTS: On March 9, 2014, Officer Dornheggen stopped Birri in Campbell County for several traffic offenses. She failed FSTs and refused a PBT. She was arrested and also refused the Intoxilyzer. She was charged with DUI and related matters. The citation indicated there was video.

During discovery, Birri's attorney requested the video. Having not received the video by the eve of trial, Birri moved for suppression of any video evidence. During a hearing, Dornheggen indicated that a video was created but he did not know if it even still existed. All evidence that would have been captured by the video was ordered suppressed. The Commonwealth asked that the charges be dismissed without prejudice, which was granted. It then appealed and the Circuit Court reversed the trial court. Birri appealed.

ISSUE: Is a denial of the admission of evidence properly addressed by the prosecution seeking a writ of prohibition?

HOLDING: Yes

DISCUSSION: Birri argued that the dismissal acted as an acquittal, which could not be appealed. The Court agreed that a dismissal by the prosecution acted as an acquittal (even though without prejudice) and thus was not subject to appeal by the prosecution.

The Court looked to Com. v. Williams, in which the Commonwealth had sought a writ of prohibition before the Circuit Court.[34] It agreed that under that precedent set by that case, along with Eaton v. Com. and, Tipton v. Com., that the admissibility of evidence is not a circumstance under which such a writ can be issued.[35] Instead, the proper method is through an original action seeking a writ of mandamus or prohibition, rather than an appeal.

The Court reversed the Circuit Court and ruled for Birri.

[34] 995 S.W. 2d 400 (Ky. App. 1999).
[35] 562 S.W.2d 637 (Ky. 1978); 770 S.W.2d 239 (Ky. App. 1989).

TRIAL PROCEDURE / EVIDENCE – BOLSTERING

Calhoun v. Com. , 2017 WL 65600 (Ky. App. 2017)

FACTS: Calhoun was charged and stood trial in Casey County for drug trafficking. The evidence "hinged heavily" on the testimony of the CI and the defense relied almost entirely on attempting to destroy the credibility of the CI. The CI admittedly also had a drug addiction and a "troubling criminal history." His testimony about the transaction with Calhoun differed from the recording of the transaction.

During the prosecution's case in chief, Det. Allen was permitted to give "rehabilitative testimony," consisting of noting the CI's reliability in other cases. That drew an objection as bolstering but the court allowed it. Ultimately he was convicted and appealed.

ISSUE: May a witness vouch for another witness's truthfulness?

HOLDING: No

DISCUSSION: The Court agreed "generally, a witness may not vouch for the truthfulness of another witness."[36] Evidence may not be offered to bolster a witness' credibility unless and until it has been attacked.[37]

At the time the detective testified, the CI had not been specifically challenged on the stand, but the issue had been addressed by the defense counsel's opening statement. Although the statement is not evidence, in that statement, counsel attacked the credibility of one of the expected witnesses. The Court agreed that opened the door to rehabilitative testimony.

The Court upheld his conviction.

Calloway v. Com. , 2017 WL 65610 (Ky. App. 2017)

FACTS: Debra Calloway was convicted in 2014 of charged connected to the 1993 murder of Patsy Calloway. At the time Debra was married to Gene Calloway, who was the brother of Patsy's ex-husband, Larry. The parties had been involved previously in an arson, in which Larry and Patsy's home was burned intentionally to collect insurance. Following an argument, which was witnessed, Patsy got into Gene's vehicle and was never seen alive again.

Following this, Larry and Gene were prosecuted for the arson, and Larry took a guilty plea. In 2008, another individual was involved in a felony case, and during an interview, he was asked about Patsy's disappearance. He indicated he'd seen her body on property owned by Debra and Gene. He had been threatened by Gene not to tell. Ultimately, Gene and Debra were indicated in the murder, although the body was never found. Gene died in 2013, prior to the trial, and

[36] McDaniel v. Com., 415 S.W.3d 643 (Ky. 2013) (citing Stringer v. Com., 956 S.W.2d 883 (Ky. 1997)).
[37] Brown v. Com., 313 S.W.3d 577 (Ky. 2010)

Debra tried to cast all the guilt on Gene. While she was in custody, a lockbox was found buried, which contained a letter in which Gene took all responsibility for Patsy's death.

Debra was convicted of Facilitation to Murder, Retaliation and Complicity for Tampering with Physical Evidence. She appealed.

ISSUE: Are statements made to family testimonial?

HOLDING: No (as a rule)

DISCUSSION: The Court looked at two statements made by Gene, who was of course, unable to testify.

> As a threshold matter, Debra argues under Parker v. Gladden[38] and Crawford v. Washington[39] that admission of these statements amounted to a violation of the Confrontation Clause. Gene's death in 2013, clearly rendered him unavailable to testify, and where an unavailable declarant makes a testimonial statement, if no opportunity for cross-examination was given, Crawford demands exclusion. This rule applies even if the statements fall within an established hearsay exception. *Id.* As the late Justice Scalia noted, "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."
>
> Crawford analysis necessarily includes a determination of whether a given statement was testimonial in nature. Crawford described testimonial statements as those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]"[40] The Supreme Court offered clarification of Crawford in Davis v. Washington.[41] Noting that "the English cases that were the progenitors of the Confrontation Clause did not limit the exclusionary rule to prior court testimony and formal depositions" the Davis Court also described "testimonial" statements as those given to law enforcement in circumstances objectively indicating no ongoing emergency and with the primary purpose of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution."

The Court agreed that Gene had made each of the statements "in a non-emergent situation," to family. He had no reason to believe that his statements would end up in a court proceeding.

[38] 385 U.S. 363 (1966)
[39] 541 U.S. 36 (2004),
[40] *See also* Manery v. Com., 492 S.W.3d 140 (Ky 2016).
[41] 547 U.S. 813 (2006).

Taking Crawford out of the equation, the Court looked at the statements under the Kentucky Rules of Evidence. The Commonwealth argued that the statements fell under the "statements against interest" exception to the hearsay rule found in KRE 804(b)(3).

Rule 804(b)(3) states as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Precedent establishes a test with four factors to weigh in determining whether a statement against interest was sufficiently trustworthy to apply the exception and admit such hearsay statements. First is the time of the declaration and to whom it was made. The second is the existence of corroborating evidence. The third factor is the extent to which the statement is actually against the declarant's interest. The final factor is the availability of the declarant as a witness.[42] In analyzing a statement under this test, courts should consider the circumstances surrounding the making of the statement.

The statement made to the witness near the time of the crime was, the Court agreed admissible, but the second statement, made by Gene shortly before his death, was much farther apart in time, a factor weighing against admissibility. Ultimately, the Court agreed that the first statement was admissible, but that the second statement should not have been admitted. It was, however, a harmless error.

With respect to the retaliation case, the Court noted that there was "no evidence in the record supports an inference of Debra's knowledge of Patsy's present intent to alert the authorities as to the arson conspiracy. Absent sufficient evidence for a jury to infer Debra shared Gene's knowledge, the Commonwealth's theory as to this count of the indictment fails. As the Commonwealth presented no proof as to an essential element, the trial court abused its discretion when denying Debra's motion for directed verdict on this offense."

The Court upheld the conviction for Facilitation and Tampering, but overturned the Retaliation conviction.

TRIAL PROCEDURE / EVIDENCE – BRUTON

Cavins v. Com. , 2017 WL 1041311 (Ky. App. 2017)

[42] Fugett at 619 (quoting Crawley v. Com., 568 S.W.2d 927 (Ky. 1978)).

FACTS: A woman called Jackson County authorities to report a "mysterious van" with two male occupants was on her Jackson, properly. Officers Lakes and Goforth arrived, and recognized Cavins as one of the two men. When Cavins spotted them, he ran into a bar, chased by Officer Lakes in his vehicle. He then chased on foot, but could not catch Cavins. Smith remained on the scene and spoke to police.

The owner of the van retrieved the vehicle, which had been taken from a mechanic's shop where it was being repaired. Cavins was charged with, among other things, receiving stolen property. During the trial. Officer Lakes testified regarding statements made by Smith (the other man), which implicated Cavins – but Smith did not testify at trial. He was convicted and appealed.

ISSUE: Is a nontestifying defendant's confession admissible?

HOLDING: No

DISCUSSION: Cavins argued that Smith's statements to the officer was improperly admitted. The Court looked to Bruton v. U.S., in which the Court "held that the admission of a nontestifying defendant's confession that expressly implicated his codefendant violated the Confrontation Clause of the Sixth Amendment of the United States Constitution, because the codefendant has no opportunity to directly question his hearsay "accuser."[43] The Court agreed it was error, and in fact, the issue had been addressed in a motion in limine, but that the error, in this case, was immaterial in the face of Cavins' overwhelming guilt. The officer's testimony made no difference in the result.

The Court upheld the conviction.

CIVIL LITIGATION

Hurst v. Caldwell, 2017 WL 128599 (Ky. App. 2017)

FACTS: On November 30, 2007, Nichols' mother made a 911 call, to report that Hurst was outside her son Aaron's trailer and had a firearm. She told 911 that "Hurst had shown up at Aaron's trailer with a gun on a prior occasion and threatened Aaron." She then clarified that she hadn't seen a weapon on the most recent occasion. She asked specifically for Chief Caldwell (Burgin PD) because he knew where the trailer was located. Caldwell was dispatched and given the information, including the "implied" weapon. He was also told Hurst had two active warrants. Caldwell, upon arrival, noted that he was "pretty sure" Hurst was a convicted felon and that a weapon was suggested by his gestures. Hurst had left the scene at that point.

According to Officer Eldridge (Harrodsburg PD), he spotted Hurst's vehicle outside a house in that city and pulled over. He saw Hurst coming out of a house and told him to stop as he was

[43] 643 F.Supp.2d 921, 932-33 (W.D. Ky. 2009), [43] 391 U.S. 123 (1968): Barth v. Com., *80 S.W.3d 390, 394 (Ky. 2001).*

under arrest. Hurst ran back through the house and out the back door. Eldridge saw ammunition in Hurst's car. Eldridge drove, looking for Hurst, and saw him running through a field. Eldridge, along with Deputies Parks and Elder, caught up with Hurst and tried to put him in custody. Hurst's aggressive actions caused Eldridge to draw his own gun. Eldridge tried to retreat but Hurst continued toward him, telling Eldridge he wanted to die. He continued to advance, saying "let's end this" and reached into a coat pocket. Eldridge fired one round, striking Hurst.

Hurst stated that he thought he was being arrested on a child support warrant. He did not comply with Eldridge's commands because "he had been arrested in Harrodsburg numerous times, and usually had not been asked to lie down or placed in handcuffs." He did not know Eldridge had been told about a possible weapon. He stated he had not made any threatening gestures or advanced on Eldridge.

Hurst filed suit against Chief Caldwell and Officer Eldridge, and their respective cities, in both state and federal court.[44] Among the claims, he stated "Caldwell negligently and erroneously reported to dispatch that Hurst was armed with a weapon and dangerous, and that Hurst had a criminal history. Hurst alleged that Caldwell's false report to dispatch substantially contributed to his injuries. Hurst also alleged that the City of Burgin was vicariously liable for Caldwell's negligence in reporting to dispatch."

Caldwell and the City of Burgin were dismissed from the case, since "neither a special relationship existed between Hurst and these defendants, nor did there exist a state-created danger." However, upon reconsideration, the trial court reinstated the state claims. Upon motion, and upon the dispatch records being provided to the court, the trial court again ruled in favor of Caldwell and Burgin, finding that the Chief accurately reported what he saw and was told, and that the shooting was unforeseeable from his point.

However, due to procedural issues, the case was still active, and Hurst filed another motion several years later, following discovery in Eldridge's case. Caldwell appealed.

ISSUE: Does a dispatcher have a legal duty to a subject?

HOLDING: No (as a rule).

DISCUSSION: The Court noted that the survival of the claims depend upon "on whether Caldwell owed a legal duty to Hurst; and if so, whether Caldwell's dispatch message breached that duty, causing Eldridge to inflict injury upon Hurst." To do so requires a special relationship between the victim and the public official.

> To establish this special relationship, two conditions must exist: "1) the victim must have been in state custody or otherwise restrained by the state at the time the injury

[44] Only the state law claims will be discussed in this summary.

producing act occurred, and 2) the violence or other offensive conduct must have been committed by a state actor.*"*[45]

At the time of the dispatch, certainly Hurst was not in Caldwell's custody. As Kentucky has not yet "adopted the state-created danger theory of liability for state tort claims and, even if it had, that theory of liability is inapplicable under the facts of this case since the act of violence (shooting) was committed by a state actor, Eldridge, and not by a private tortfeasor." [46]

The Court agreed that since Hurst had not proven a legal duty on the part of Caldwell, it must dismiss the case against Caldwell and the City of Burgin.

McCuiston (Estate) v. Butler / City of Henderson, 509 S.W.3d 76 (Ky App. 2017)

FACTS: On July 28, 2012, Joyce McCuiston called 911, Butler (Henderson 911) answered it. She called from a cell phone to report a "non-active theft." Her speech was slurred so he had to ask her several times to confirm who she was and her address. She told him she was dehydrated and unable to come to the door, but never asked for help. She told him to tell the responder that the door was open and that she'd call out when they arrived, but he did not pass that on to the deputy sheriff dispatched.

Deputy King arrived, but was not sure he was at the correct house since it was not numbered. He knocked but got no answer. He spoke to the neighbor, who reported McCuiston owned it but was "in and out," and that no one lived there all the time. She also explained McCuiston was a severe alcoholic and if awake, was drunk. She added that if she had called 911, it was likely from a pay phone. Deputy King tried the number that was provided by 911, with no answer. Further knocking went unanswered. He told dispatch that he was advised that no one lived there, but admitted later that was misleading. Butler relied on that information and believed he'd misheard the address. He did not tell the Deputy about the instructions at the end of the call and later stated that he did not want to send the deputy into the wrong address.

Three days later, friends entered the residence and found McCuiston dead. During the death investigation, the prepaid cell phone was found and an investigation was launched. The Henderson Police Chief initiated an employment termination for Butler and a hearing was held. Butler was suspended for six months, but not terminated.

Dr. Stewart, the Medical Examiner, ruled that McCuiston's death was due to natural causes, including hypertension and alcoholism. It was not possible to set the time and date of her death, precisely.

The Estate filed suit against Butler and the City of Henderson. The City argued there was no duty to which McCuiston was entitled, and trial court dismissed the action. The Estate appealed.

ISSUE: Is a 911 call-taker necessarily in a special relationship with a caller?

[45] City of Florence v. Chipman, 38 S.W.3d 387 (Ky. 2001).
[46] Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).

HOLDING: No

DISCUSSION: The court noted that "because a wrongful death action is a tort, it is necessary to prove that a party was negligent to receive relief under the statute.[47] Generally, to make a claim of negligence, a party must establish that there is a recognized duty, a breach of that duty, and a resulting injury. Proof of each element is absolutely necessary.[48] The trial court had agreed that Butler did have a legal duty under "special relationship," an issue that was not contested.[49]

The public duty doctrine was elucidated in Ezell v. Cockrell.[50]

> The public duty doctrine originated at common-law and shields a public employee from suits for injuries that are caused by the public employee's breach of a duty owed to the public at large.[51] The doctrine can be traced to the United States Supreme Court's decision in South v. Maryland, which held that a sheriff is not liable for failing to protect a kidnap victim because the sheriff's duty to keep the peace was "a public duty, for neglect of which he is amenable to the public, and punishable by indictment only."[52]

Quoting Ezell, the Chipman court noted its agreement and stated:

> [P]ersons who serve the public must be allowed to carry out their function without fear of having to answer for harm caused to an individual by events which are outside the control of the public official. Public officials are not an insurer of the safety of every member of the public, nor are they personally accountable in monetary damages only because the individual is a public official charged with a general duty of protecting the public.

The Court continued: "the rationale behind the public duty doctrine is that to impose a universal duty of care on public officials would severely reduce their ability to engage in discretionary decision-making on the spot. Because 911 operators serve the public, their actions are also encompassed under the public duty doctrine." It "reinforces the proposition that to impose a duty of care on a public official, there must exist a "special relationship" between the party and the public officer, the public officer does not have a duty to a particular individual." "In Fryman v. Harrison, and other cases, Kentucky Courts have determined that public officials are not guarantors of public safety and, as such, do not have a duty of universal care to protect the general public from harm or accident.[53]

The special relationship test was explained in Fryman when the Court stated that "[i]n order to establish an affirmative legal duty on public officials in the performance of their official duties, there must exist a special relationship between the victim and the public officials." To reiterate,

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[47] *Saylor v. Hall*, 497 S.W.2d 218, 222 (Ky. 1973).
[48] Com., Transportation Cabinet, Department of Highways v. Guffey, 244 S.W.3d 79, 81 (Ky. 2008).
[49] City of Florence, Kentucky v. Chipman, 38 S.W.3d 387 (Ky. 2001).
[50] 902 S.W.2d 394, 397 (Tenn. 1995)
[51] Kelly M. Tullier, Governmental Liability for Negligent Failure to Detain Drunk Drivers, 77 Cornell L.Rev. 873 (1992).
[52] 59 U.S. (18 How.) 396 (1855).
[53] 896 S.W.3d 908 (Ky. 1995).

there must be a special duty owed by the public official to a specific, identifiable person and not merely a breach of a general duty owed to the public at large.

Fryman developed a two-prong test demonstrating a "special relationship, which was also elucidated in Chipman. Initially, it observed that "for a claim to be actionable in negligence, there must be the existence of a duty and unless a special relationship was present, there is no duty owing. . . ."[54] The Court continued that to establish a special relationship, it is necessary to demonstrate that "(1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and (2) the violence or other offensive conduct must have been committed by a state actor."

Most recently, in Kentucky, the issue arose in Gaither v. Justice & Public Safety Cabinet.[55]

The Court noted that:

> The trial court then related that American courts have addressed the issue of whether a 911 operator has a duty in various ways. Some courts have held that the creation of a 911 service establishes a "special relationship" or duty to its callers, either by itself or when the caller detrimentally relies on the dispatcher's assurances of help.[56] Other courts have found that a telephone call for assistance was not sufficient to create a duty to the caller.[57] Then, without articulating any analysis that established the reason that the trial court believed that a "special relationship" existed in this matter, the trial court opined that after its review of Chipman, Fryman, and Gaither, it was more persuaded that 911 dispatchers have duty to callers beyond that owed to the public at large. Therefore, under the trial court's reasoning, every 911 dispatcher would have a "special relationship" with every caller. We disagree with the conclusion that Butler had a "special relationship" with Ms. McCuiston, and therefore, a legal duty to her.2 Moreover, we do not believe under the Fryman, Chipman, and Gaither analyses, our Courts have extend the "special relationship" to all calls to 911 dispatchers. In Gaither, the Court clarified that "[t]he 'special relationship' rule was developed in the context of injuries suffered by members of the general public disassociated with and far removed from negligent acts that allegedly caused their injuries." In this case, however, Butler only acted in the prescribed manner for a 911 dispatcher and performed his responsibilities in the typical manner. In other words, he did nothing beyond his public job responsibilities that would create a "special relationship" with Ms. McCuiston.
>
> Moreover, the Gaither Court cautioned against applying "a rule based upon the lack of a foreseeable injury in a case where the injury was uniquely foreseeable" and where "a state agency actually created a connection with the injured claimant, and then repeatedly fostered the continuation of that relationship."

[54] Chipman, 38 S.W.3d at 392.
[55] 447 S.W.3d 628 (Ky. 2014).
[56] See Delong v. County of Erie, 89 A.D.2d 376, 455 N.Y.S.2d 887 (N.Y. 1982).
[57] Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981).

Here, the Estate cannot establish that Butler, outside his role as a 911 dispatcher, created a connection with Ms. McCuiston and repeatedly fostered the continuation of that relationship. Instead, he performed his regular duties, took the call, and sent help in a non-emergency situation. Butler never created a "special relationship" with Ms. McCuiston where her death was uniquely foreseeable based on the connection with the 911 dispatcher. Instead, Ms. McCuiston can appropriately be classified as a member of the general public with whom Butler interacted as a 911 dispatcher. Without a special relationship, Butler's action fell under the "public duty" doctrine, which does not make public officials guarantors of public safety with a universal duty of care to protect the general public from harm or accident. Butler did not establish a "special relationship" with Ms. McCuiston, and therefore, he did not have a duty of care to her and was protected from liability by the public duty doctrine. Without any legal duty, there can be no wrongful death action. Although Ms. McCuiston's death is a tragedy, it is not one for which Butler or the City of Henderson can be held liable.

Having determined that Butler had no special relationship with Ms. McCuiston, and thus, cannot be liable in a wrongful death action, the remaining issues are rendered moot.

FIRST AMENDMENT

Kindle, Silveria and Adkins v. Emington, 2017 WL 544639 (Ky. App. 2017)

FACTS: Kindle, Silveria and Adkins were employed by the Jeffersontown PD in 2006. They filed a complaint against Assistant Chief Emington alleging mismangemant and abuse of authority. That was dismissed by the local Ethics Commission. Emington complained with civil service that they and disclosed false information in violation of the agency's SOPs. The three did not present a defense, arguing that they were pursuing a circuit court action. They were terminated.

Emington filed an action against the three (and others) claiming that they had disseminated confidential information. The three claimed First Amendment retaliation. Ultimately the Sixth Circuit found in favor of the Jeffersontown defendants. Ultimately Emington received summary judgement on her state claims. The three appealed.

ISSUE: Does a First Amendment retaliation claim first require evidence of constitutionally protected speech?

HOLDING: Yes

DISCUSSION: The Court noted that a claim of First Amendment retaliation requires proof that they "engaged in constitutionally protected speech" that is not false and defamatory.[58] The Commission found that, and the three failed to litigate or appeal it. As such, further discussion on the issue was precluded.

[58] Brandenburg v. Hous. Auth. Of Irvine, 253 F.3d 891 (6th Cir. 2001); Hill v. Petrotech Res. Corp., 325 S.W.3d 302 (Ky. 2010).

The appeal was dismissed.

SIXTH CIRCUIT

FEDERAL LAW – ACCA

U.S. v. Glover, 2017 WL 838280 (6th Cir. 2017)

FACTS: Glover was sentenced under the Armed Career Criminal Act (ACCA) as a three-time offender. Glover argued that one of his convictions, for assault on a police officer under Ohio law, did not qualified as a violent offender for ACCA purposes.

ISSUE: Does assault on a police officer require proof of physical force for the ACCA?

HOLDING: Yes

DISCUSSION: The Court noted that charge must be applied under the residual clause of the ACCA, because it was not enumerated. It would qualify under the ACCA as a violent felony only if it included physical force as an element. Like Kentucky's statute, the elements of Ohio's provision required a subject "knowingly cause or attempt to cause physical harm" to an officer. Although the Court had previously considered the law to qualify, Glover argued that the prior case must be reevaluated under U.S. v. Castleman.[59] The Court disagreed and held that a conviction under that statute qualified as a predicate offense under the ACCA.

FEDERAL LAW

FEDERAL LAW - SEXUAL CRIMES WITH A MINOR

U.S. v. Lively, 852 F.3d 549 (6th Cir. 2017)

FACTS: In April, 2009, Norwood-Charlier invited Lively and Quackenbush to visit him for the weekend in Kalamazoo, MI. They had met in online chatrooms. He was living with the wife of his stepmother, Schomer, who had three children in the household as well. During the visit, Norwood-Chandler photographed Lively performing oral sex on Schomer's 9 year old son. The incident was planned in advance – and the visit was for the purpose of committing sexual abuse on one or more of the children.

Within a few days, the FBI executed a search warrant at the house, seeking items used to create child pornography. They recovered three items of importance: "Norwood-Charlier's Kodak digital camera, the SanDisk memory card that was inside the camera, and a computer that contained a Seagate hard drive." Two identical sets of four photos were found on each of the storage media. Norwood- Charlier quickly pled guilty and provided information concerning the two other men. In 2013, both men, who were living together in Nevada, were charged.

[59] 572 U.S. --- (2014)

Lively specifically was indicated for "sexually exploiting a minor in violation of 18 U.S.C. §2251(a), 2251(e), and 2256(2)(A)." Lively was ultimately convicted and appealed.

ISSUE: May child pornography be "produced" onto a SD card?

HOLDING: Yes

DISCUSSION: First, Lively argued that the prosecution did not meeting the statutory interstate-commerce requirement of §2251(a). The Court agreed that the fact that the hard drive (upon which the government relied to make this charge) was manufactured overseas did not satisfy the requirement. However, the court agreed the images were produced on a SD card, which was produced in China, and that did have the required nexus. As such, the Court held that the requirement was met.

The Court agreed the boy was sexual exploited for the purpose of producing visual depictions of the conduct, and with materials moved in interstate commerce. The Court agreed that copying images onto a hard drive (referred to as the "hard drive images" by the court) was "producing" – but that there was insufficient evidence in the case of those images that he abuse was for the purpose of that. The Court, however, noted that there was a second set of images (the SanDisk images) that were recorded on the SD card that was made in China, and those certainly met the requirement.

The Court reviewed the definitions in question and agreed that "producing" was "sufficiently broad, and sufficiently non-technical, to encompass copying images onto a hard drive." The definition of "visual depiction" clearly contemplated the digital storage of produced images as well. However, Lively did not produce the images, Norwood-Charlier did, and there was no evidence that Lively abused the boy for the purpose of creating the images. In a deep grammatical discussion of the statutory language, the Court agreed Lively did not produce the images for exploitation onto the hard drive, but did do so with respect to the images on the SD card.

The Court concluded:

> Viewing the evidence at trial in the light most favorable to the government, we conclude that the government satisfied § 2251(a)'s interstate-commerce requirement because the SanDisk memory card bore a "Made in China" trade inscription.

The Court affirmed Lively's conviction.

U.S. v. Sibley, 2017 WL 900112 (6th Cir. 2017)

FACTS: Diamond ran away with Sibley when she was 17, in July, 2014. He held her in a Columbus motel for a month, forbade her contact with a family member and would track her down when she tried to leave. When Sibley needed money, he suggested Diamond prostitute

herself. She was angry but complied, feeling she had no choice. Sibley created ads and posted photos of her and used his cell phone for the business.

In July, Det. Dennis was notified about a missing girl likely being prostituted in Columbus by the National Center for Missing and Exploited Children. He set up a "date" with the girl and negotiated a price for sex. Dennis then identified himself as police and verified the girl was Diamond. Sibley returned and was arrested. The information was verified and when they checked his phone, found sexually explicit photos of Diamond.

Sibley was indicted on federal charges of child sex trafficking and sexual exploitation of a minor. It specifically indicated he'd used his cell phone (made in interstate commerce) to take the photos. Diamond later testified that the male genitalia in several of the photos were Sibley's.

Sibley was convicted of sexual exploitation, but the jury could not reach a verdict on the trafficking. Sibley appealed.

ISSUE: Is it proper to consider a group of photos in the same ten day time frame in toto?

HOLDING: Yes

DISCUSSION: Sibley argued that the charges were duplicitous. The Court looked to the statute for sexual exploitation[60] and noted that he'd used the girl "to produce pornographic digital-image files over a ten-day period." Sibley argued that each image should have been considered a separate offense and not considered in toto. The Court agreed that since Diamond testified he took all the photos (rather than only some of them), it was proper to consider them as they were.

> Sibley also argued that Diamond was of age to consent to sexual conduct in Ohio and because the photos were not intended to be seen by anyone else, it could not be child pornography. The Court, however, noted those were not factors under the federal law and that Diamond's consent, or lack of, to the taking of the photos was immaterial.

The Court upheld his conviction.

U.S. v. Zavala, 2017 WL 838283 (6th Cir. 2017)

FACTS: Zavala subscribed to an adult sexual website. He contacted another user, Kelli, who suggested that both she and a "younger version" of her (Amy) needed to be trained. Zavala replied that age wasn't an issue so long as the younger person was over 12 and Kelli would be present. However, Kelli was in fact a profile maintained by undercover law enforcement. When they set up a meeting at a hotel, he was arrested. He waived Miranda and stated he knew it was "not right … to have sex with a child."

He was charged with attempting to induce under federal law. At the trial, the jury heard, over the objection of the defense, that at least 15 contacts had been made through the Kelli profile.

[60] 18 U.S.C. 2252.

Some ended communication when they learned the age of the purported younger individual. But for those that went ahead, and communicated with the person they believed with a minor, and set up a meeting, the intent was satisfied. Zavala testified that he originally thought Amy was real, but had "started to believe" Kelli was roleplaying. Zavala was convicted and appealed.

ISSUE: Under federal law, for child inducement, must the suspect be talking to an actual minor?

HOLDING: No

DISCUSSION: Zavala argued that under the federal law, he must have "enticed an actual minor" – not someone roleplaying. However, under U.S. v. Roman, the court agreed that the crime was complete when the inducement occurred, even if the actual person with whom they were communicating was an adult intermediary.[61] In addition, it was not entrapment as he initiated the exchange in response to Kelli's posting.

The Court also stated that any error on introducing evidence of other investigations was immaterial.

The Court affirmed the convictions.

CONSTRUCTIVE POSSESSION

U.S. v. Lewis, 2017 WL 167470 (6th Cir. 2017) (CERT REQ)

FACTS: In 2014, Lewis had outstanding arrest warrants. In October, Memphis PD was tipped that Lewis was at a specific apartment. The occupant, Kenya Baskin, stated she was Lewis's girlfriend but that he was not there. She gave consent for a search, and as they went through, the spotted Lewis going out the window. They could not catch him. A few weeks later, officers received a "shots fired" call and recognized the address as the same apartment complex. They learned from witnesses that two males, with guns, fled into the Baskin apartment. A witness identified a photo of Lewis as being one of the two men.

The officers knocked on the door, with no response. They requested an entry team for a possible arrest. While waiting, they could see someone peeking out. When the team arrived, they entered and arrested Lewis and Perkins. While other officers were finding the pair, an officer found a "firearm sticking out of the top of a sugar bag stored in a double-doored cabinet under the sink." During a secondary search, they found ammunition that matched the firearm in the bedroom closet.

Lewis, a felon, was charged with possession of the firearm, and moved for suppression. He argued that he had an expectation of privacy, as he was a regular overnight guest and had a key. (In fact, others in the complex believed he lived there.) He argued there were no exigent

[61] 795 F.3d 511 (6th Cir. 2015).

circumstances allowing the entry and that the search of the kitchen was also improper. He backtracked at the hearing, claiming to only be a regular visitor and thus, they officers lacked a reasonable belief that he was there. Ultimately, the court upheld the entry.

At trial, Lewis challenged that there was evidence that he possessed the firearm. Perkins and Baskins testified that they knew nothing about the firearm, but agreed that there were several other who visited on a regular basis. Baskin stated Lewis had another legal address, but that only the two of them had access to the closet, and that for the firearm to be in the kitchen, Lewis had to let them in. Lewis objected to a recording of a jail call between him and Perkins, and after some debate, withdrew the objection, reasoning that it could be shown that Perkins possessed the gun.

Lewis was convicted and appealed.

ISSUE: Is constructive possession enough to convict a felon of a firearm?

HOLDING: Yes

DISCUSSION: First, the Court agreed that the statements of the unidentified witnesses at the scene were not hearsay, as they were "not offered as evidence that Lewis was in fact in the apartment, but rather as support for the officers' belief that he was there." The entry was valid under Payton v. New York, as they had a "reasonable belief that the subject of the warrant" lives at the location and that the subject is actually inside.[62]

The Court noted that it had "remained undecided, stating that it is 'an open question' whether reasonable belief or probable cause is required." [63] However, the Court agreed it was still unnecessary to resolve that question, as the higher standard was met by the facts.

With respect to the protective sweep, which revealed the gun, the Court agreed that they officers believed two individuals were involved in the shooting, and while they had located two people, that did not know if they had the two people actually involved. And, the Court noted, the space under the kitchen sink was large enough for a person to hide.

Finally, the Court agreed that although there was no proof of Lewis being in actual, witnessed, possession of the firearm in question, his conviction was based on constructive possession. [64] "Mere presence is not enough, but 'other incriminating evidence, coupled with presence … will serve to tip the scale in favor of sufficiency."[65] In this case, the Court agreed, there was more than sufficient evidence that he constructively possessed the firearm in question.

The court upheld his conviction.

SEARCH & SEIZURE

[62] 445 U.S. 573 (1980); El Bey v. Roop, 530 F.3d 407 (6th Cir. 2008).
[63] U.S. v. Block, 378 F.App'x 547 (6th Cir. 2010); U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008).
[64] U.S. v. Kelsor, 665 F.3d 684 (6th Cir. 2011).
[65] U.S. v. Birmley, 529 F.2d 103 (6th Cir. 1976).

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Stone, 2017 WL 218883 (6th Cir. 2017) (CERT REQ)

FACTS: Stone was involved in drug trafficking in Berea in 2014. His home was searched on May 14, 2014, as a result of a warrant issued on the following affidavit.

On May 9, 2014, Detective Varney was informed by a cooperating witness ("CW") that the CW could purchase heroin from Nicky Hampton. Hampton was supplied the heroin by a black male who was attending Eastern Kentucky University. The CW then told Detective Danny McGuire that the unknown black male would be arriving at Hampton's residence. Detective McGuire drove to Hampton's residence and observed a black male exit the residence carrying a backpack and then drive away in a Toyota Camry registered to Neal Stone. Detective McGuire followed the vehicle to Eastern Kentucky University, where he lost it in traffic. Detective McGuire later learned that Stone had an address of 818 Brockton, which is located on the Eastern Kentucky University campus. After receiving this information on May 9, Berea Police gave the CW money to make a controlled purchase of one gram of heroin from Hampton. A few days later, Berea police conducted another controlled buy. The CW met with Hampton to purchase heroin, and Hampton informed the CW that she was supposed to meet her supplier but could not bring the CW with her to the meeting. The CW was dropped off in the Walmart parking lot. In the meantime, Madison County Sheriff's Detective Jasper White drove to 818 Brockton. Detective White saw Stone leave 818 Brockton and followed him to Richmond Centre, where he lost the car in traffic.

Police also followed Hampton and a white male, later identified as Josh Bogie, to Richmond Centre. Hampton and Bogie stopped at a Culvers Restaurant in Richmond, and Hampton entered the business and exited a short time later and got back in the vehicle with Bogie. They returned to the Walmart parking lot, where they picked up the CW. They then dropped the CW off in a Kohls parking lot.

Police stopped Bogie and Hampton in the Kohls parking lot. Bogie was in possession of a small amount of heroin. No narcotics were found on Hampton, but she claimed that she purchased the heroin found on Bogie from Catherine Leake inside the Culvers bathroom. Hampton and Bogie agreed to cooperate with police by arranging a heroin deal with a man they knew as "Mike." Later that same day, Bogie made a consensually monitored and recorded call to "Mike," whom law enforcement believed to be Stone, to arrange the purchase of two grams of heroin. "Mike" agreed, and the two planned to meet at Walmart. Detective McGuire rode with Bogie and Hampton to Walmart, and Detective White observed Stone and Leake exit 818 Brockton and leave the area in the red Toyota Camry registered to Stone. Detective White followed the vehicle to Richmond Plaza. Stone told Bogie to meet at McDonald's and to have Hampton enter the McDonald's bathroom, where Leake was waiting. Detectives encountered

Leake inside McDonald's, and Stone as he sat in his car outside of the restaurant. No drugs were found in Stone's vehicle or in his possession. Leake was arrested and was searched during the booking process, when a small amount of heroin was discovered.

Among other things seized was a black backpack with Stone's ID, heroin, money a scale and syringes. Leake was arrested. When Jordan, who had worked as a CI before, tried to post $30,000 in cash for a bond, they seized the money and worked with Jordan on a reverse buy involving Stone.

Stone was arrested. He moved for suppression, which was denied. Stone was convicted and appealed.

ISSUE: Is the standard for sufficiency of a warrant affidavit the totality (rather than the details)?

HOLDING: Yes

DISCUSSION: The Court noted that the standard for judging the warrant was "whether the judge had a "substantial basis" for concluding that a search would "uncover evidence of wrongdoing." Despite his attempt to nitpick details, the court agreed that the affidavit provided a totality of the circumstances connection between the home and the crime.

The Court affirmed the conviction.

U.S. v. Banks, 2017 WL 1187530 (6th Cir. 2017)

FACTS: In November, 2014, Officer Brouwer (Holland PD) was dispatched to a victim of a gunshot wound who had arrived at a hospital. He concluded at the time that the shooting was a self-inflicted accident. A month later, the officer responded to a call of a suspicious vehicle and found the same vehicle and individual (Banks). Knowing that the gun in the first incident hadn't been located, the officer backed off and waited for backup. He also knew Banks was the suspect in a drug investigation. The vehicle smelled strongly of marijuana.

Officer Reimink, with his drug dog, arrived. They approached and the officers split up the occupants, Banks and Conley. Conley was arrested on outstanding warrants and when searched, no drugs were found, but a large amount of cash was. Banks denied consent for a search of the vehicle, but the dog alerted. The dog jumped into the passenger side door – which had been left open when Conley got out. Reimink searched, finding a gun, at which point, Banks was handcuffed. A more detailed search was done pursuant to a warrant but no drugs were found. A scale, was, however. Banks also was found in possession of a large amount of cash. Knowing that Banks had previously hidden drugs inside his body, Brouwer, with permission, attempted a strip search, but Banks was uncooperative.

The officers obtained a search warrant for a cavity search. Taken to the hospital, the doctor explained they should have Banks take a laxative and then take an X-ray. Banks asked to see the doctor, and it was explained to him. He then voluntarily voided the bag containing drugs.

Banks was charged, and moved for suppression. When denied, he took a conditional guilty plea, and appealed.

ISSUE: Is an X-ray and laxative, in lieu of a more detailed body cavity search, too intrusive?

HOLDING: No

DISCUSSION: Banks argued that the wording of the warrant did not authorize an "interior" search, but the Court agreed that when read in a common sense manner, it authorized a search beyond what the officers had already completed. Cavity, given its ordinary meaning, suggested that as well. The Court also agreed it was not necessary for the warrant to specify the exact method of the medical procedure and that it was up to the discretion of the officers with advice from medical personnel.

In such searches, whether a search is constitutionally reasonable by weighing three factors: "(1) the extent to which the procedure may threaten the safety or health of the individual, (2) the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity, and (3) the community's interest in fairly and accurately determining guilt or innocence."[66]

In this case, the proposed method was not dangerous and of course, the evidence would have been produced eventually, through inevitable discovery – as they were prepared to wait as long as it took.

The Court upheld his plea.

U.S. v. Young, Parnell, Vance and Duncan, 2017 WL 218883 (6th Cir. 2017)

FACTS: Young, Parnell, Vance and Duncan were investigated as a result of a multi-year, complex, drug trafficking case out of Clarksville, TN. Evidence against them included "testimony from five co-conspirators and a witness to a warranted search of Duncan's residence, testimony from law enforcement agents, more than two hundred intercepted phone conversations between co-conspirators, surveillance footage, and evidence seized during the warranted searches and arrests." All four were convicted on various charges and appealed.

ISSUE: Does a wiretap require only consideration of other methods?

HOLDING: Yes

[66] U.S. v. Booker, 728 F.3d 535 (6th Cir. 2013).

DISCUSSION: Duncan argued that "(1) that the affidavit in support of the wiretap application failed to establish probable cause, and (2) the wiretaps were not necessary to the investigation because the investigation's objectives could have been satisfied without resorting to such an extraordinary surveillance technique." To do such surveillance, "federal law enforcement officials must secure authorization by making an application containing "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."[67] This provision, commonly referred to as the "needs statement provision," was designed to insure that wiretapping is not resorted to in a situation where traditional investigative techniques "would suffice to expose the crime."[68] A district court has "considerable discretion" in determining whether the requirements of § 2518(1)(c) have been satisfied.[69] The Court agreed that standard was satisfied in this case, noting that "The government "is not required to prove that every other conceivable method has been tried and failed or that all avenues of investigation have been exhausted."

We have summarized the "necessity requirement" as follows:

> All that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate. This is precisely what the government did in this case. Agent Whitsett stated in the wiretap application that the agents used telephone toll records and pen register data as an investigative tool; however, he noted that "[t]his technique . . . only will provide agents with a list of numbers called and will not establish the identities of the persons called or the content of the conversations . . . . Such information is most productive when used in conjunction with intercepted conversations." Moreover, the affiant noted that "the information gleaned from [these] telephone records alone has not enabled agents to identify additional Target Subjects, i.e., the source(s) of supply, or ascertain the inner-workings of the organization."

The Court agreed that the officers clearly considered other methods of investigation, and that the wiretap was the best choice under the circumstances. As such, there was no error in denying the suppression m0tion "because the affidavit gave a substantial basis for finding probable cause and necessity."

With respect to a search of Duncan's home, the Court agreed that "In order to establish probable cause, there must be a nexus between the place to be searched and the evidence sought.[70]

The lawful wiretaps demonstrated Duncan lived at the location and that drugs, money and

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[67] 18 U.S.C. § 2518(1)(c).
[68] U.S. v. Alfano, 838 F.2d 158 (6th Cir. 1988) (citation and internal quotations marks omitted). "[W]hat is needed is to show that wiretaps are not being routinely employed as the initial step in criminal investigation."
[69] U.S. v. Stewart, 306 F.3d 295 (6th Cir. 2002) (citation and internal quotation marks omitted).
[70] *See* U.S. v. Laughton, 409 F.3d 744 (6th Cir. 2005) (citations omitted).

firearms would be found there. GPS locaters on the wiretapped phone placed Duncan at the location and he identified that as his home in prior interactions with law enforcement. The evidence was not stale "tale evidence because the conspiracy at issue was ongoing and the place to be searched was a secure operations base for the conspiracy.[71]

> The staleness probe depends on the "inherent nature of the crime."[72] We must inquire into whether information in the affidavit that is arguably three to six weeks old is stale.[73]
>
> In analyzing whether information is stale, this Court considers the following factors:
> (1) the character of the crime (chance encounter in the night or regenerating conspiracy?),
> (2) the criminal (nomadic or entrenched?),
> (3) the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), and
> (4) the place to be searched (mere criminal forum of convenience or secure operational base?).[74]

Duncan argued that the facts did not support this his home being a notorious drug location – but the court noted that the "the character of the crime, conspiracy to traffic narcotics, is not a chance encounter in the night. It is a regenerating conspiracy." Nor was he nomadic, having lived at that location for some years. Drugs are easily consumable and mobile, and are often located at an "operational base," with a number of incidents tied to the location.

The Court also discussed the argument that there was a misrepresentation because the CI was related to one of the defendants, Vance. (The Court also noted that the underlying affidavit was 187 pages long.)

Three of the four also appealed the agent's testimony which interpreted the conversations obtained through the wiretap, invading the "jury's province by repeatedly interpreting ordinary English language terms in violation of U.S. v. Freeman.[75]"

Courts frequently qualify law enforcement officers as expert witnesses under Federal Rule of Evidence 702 to interpret intercepted conversations that use "slang, street language, and the jargon of the illegal drug trade."[76] Conversely, when a law enforcement officer is not an expert witness, the officer's lay opinion testimony is admissible "only when the law enforcement officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred." Federal

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[71] *See* U.S. v. Spikes, 158 F.3d 913 (6th Cir. 1999) (citing W. LaFave, *Search and Seizure* § 3.7 (3d ed. 1996) (noting as a general matter that stale information cannot be used in a probable cause determination)).
[72] *Id*. (quoting U.S. v. Henson, 848 F.2d 1374 (6th Cir. 1988)).
[73] *Cf.* U.S. v. Frechette, 583 F.3d 374, 378 (6th Cir. 2009) (noting that information that is sixteen-months old in the drug trade is usually stale because drugs are sold and consumed in a prompt fashion).
[74] Frechette, 583 F.3d at 378 (citing U.S. v. Abboud, 438 F.3d 554 (6th Cir. 2006) (citation omitted)). *See also* U.S. v. Kennedy, 427 F.3d 1136 (8th Cir. 2005) ("[I]nformation of an unknown and undetermined vintage relaying the location of mobile, easily concealed, readily consumable, and highly incriminating narcotics could quickly go stale in the absence of information indicating an ongoing and continuing narcotics operation.")(citations omitted)
[75] 730 F.3d 590, 595-99 (6th Cir. 2013)"
[76] Kilpatrick, 798 F.3d at 379 (quoting U.S. v. Peoples, 250 F.3d 630 (8th Cir. 2001)).

Rule of Evidence 701 states that if a witness is not testifying as an expert, "an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[77] The proponent of this testimony must establish that all three requirements are met. The purpose of lay opinion testimony is to "describe[e] something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a first-hand witness to a particular event."

In one specific, the Court noted that the agent offered two possible meanings for a slang term used and accepted a continuing objection for that term. However, the defense attorneys did not object to other terms as they were specifically instructed to do and the court agreed it was not plain error to admit it. Further, the agent had been involved in the investigation for a long period of time and had in-depth personal knowledge of it.

Further, agents are permitted to testify regarding how they became involved in a case, what allegations they were investigating, who the suspects were, and similar background information.[78] "This sort of testimony, which is designed to set the stage for the introduction of evidence, differs substantively from problematic 'preview testimony' that 'purports to sum up (in advance of the evidence) the government's overall case.'" In Kilpatrick, this Court held that the case agent's testimony concerning the allegations she investigated was proper lay opinion testimony because "[s]he did not offer conclusions or impermissibly argue the government's case." "Explaining the allegations underlying an investigation does not implicate Rule 701 or Freeman."

Further, Parnell next argues that the district court erred by admitting co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E). Specifically, Parnell contends that the district court erred by not making any factual or legal findings as to whether the requirements under Rule 801(d)(2)(E) were satisfied.

"To admit statements of a co-conspirator under Rule 801(d)(2)(E), a trial court must find that: (1) the conspiracy existed; (2) the defendant was a member of the conspiracy; and (3) the co-conspirator made the proffered statements in furtherance of the conspiracy."[79] This is sometimes referred to as an Enright finding.[80] The district court may "admit the hearsay statements subject to later demonstration of their admissibility by a preponderance of the evidence."[81] Whether the government made the necessary showing is a question of fact that this Court reviews for clear error.[82] This Court reviews the district court's legal conclusion regarding admissibility *de novo*.[83]

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[77] Fed. R. Evid. 701.
[78] Kilpatrick, 798 F.3d at 381 (citing U.S. v. Goosby, 523 F.3d 632 (6th Cir. 2008)).
[79] U.S. v. Warman, 578 F.3d 320 (6th Cir. 2009) (citing U.S. v. Wilson, 168 F.3d 916 (6th Cir. 1999)).
[80] *Id*.; *see also* U.S. v. Enright, 579 F.2d 980 (6th Cir. 1978).
[81] Warman, 578 F.3d at 335. (citations and internal quotation marks omitted).
[82] U.S. v. Maliszewski, 161 F.3d 992 (6th Cir. 1998) (citation omitted).
[83] *Id*. (citing U.S. v. Carter, 14 F.3d 1150 (6th Cir. 1994)).

First, Parnell appeared to have made a general objection to the co-conspirator statements being admitted vis-a-vis Duncan's objection that the "proof has failed to show that Mr. Duncan was a part of the alleged conspiracy in this case, and that those calls, other than the calls that obviously captured Mr. Duncan, should be stricken from the record." (The record indicates that the district court instructed Defendants to object to the statements as the government sought their admission so the court could "have on the record that there are no objections" because that "is the way [the district court] ha[d] been doing it." But the record indicates that despite this instruction, Parnell did not object to the coconspirator statements as instructed. Moreover, even if the brief reference by Duncan's counsel preserved Parnell's objections, it preserved them only to the extent that Parnell argued he was not a member of the conspiracy. The Court agreed it too was properly introduced.

Taking the sum of the evidence together, the Court agreed that the trials, although not perfect, resulted in a fundamentally fair trial. The Court upheld the convictions.

SEARCH & SEIZURE – SEIZURE

Middaugh v. City of Three Rivers, 2017 WL 1179375 (6th Cir. 2017)

FACTS: This case revolves around the disputed possession of a 1992 Buick, which had changed hands multiple time in the Middaugh family over the years. During one of the exchanges, Officer Piper (Three Rivers PD) became embroiled in the issue and in another, a year later, Officer Gipson was pulled into the fray. Eventually, the officers allowed someone to take the car, believing that purpose had the legal right to do so, and the Buick was damaged in the interim, and personal property was missing.

The Middaughs sought civil damages against the officers under 42 U.S.C. §1983.The Court noted that the officers did not take the vehicle, but allowed another to do so, in their presence. In Hensley, the Court had held that such repossession cases fall in between de minimus state action to active intervention.[84] When the officer is present solely to keep the peace, that is not enough for state action. When officers take an active role, however, that becomes a different matter.

In this case, the court agreed, the officers' actions fell into the active category as they provided cover for the taking of the vehicle by the way they positioned their own vehicles and brining the person who took it to the house. However, the Court agreed, it was debatable that the officers could have believed their actions were lawful, given precedent at the time, as they did not confront the occupants where the vehicle was taken.

The Court agreed they were entitled to qualified immunity.

[84] Supra.

SEARCH & SEIZURE – ABANDONED PROPERTY

U.S. v. Phillips, 2017 WL 700223 (6th Cir. 2017) (CERT REQ)

FACTS: On September 8, 2014, just before 10 p.m., Detroit officers on patrol spotted Phillips "walking alongside cars parked in the street." There had been instances of possible vehicle thefts recently. They trained their spotlights on Phillips, then slowed to a stop near him. They could see the grip of a handgun in his pocket. As they got out of their vehicles, Phillips took off running, and they gave chase, yelling at him to stop. He abandoned the gun when it fell out of his pocket. It was retrieved by one of the officers, while others officers finally tracked Phillips down and arrested him.

Phillips, a convicted felon, was charged with possession of the firearm. He moved to suppress the firearms and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is accidental abandonment during a chase still abandonment?

HOLDING: Yes

DISCUSSION: The Court noted that every Fourth Amendment claim had to involve a search or a seizure and "without one or the other," there could be no violation. He contended he was seized by the officers getting out of their vehicles. The Court, however, noted that under California v. Hodari D., when a fleeing suspect sheds evidence before being apprehended, it is not the product of a seizure."

Phillips argued that his case differed before the officers lacked at reasonable suspicion to stop him, and that they could not know that he was involved in any criminal activity. The Court, however, noted that under U.S. v. Martin,that the principles of Hodari still applied.[85]

Further, the Court discounted his argument that the abandonment was inadvertent rather than intentional, as it was in Hodari. Once dropped the gun in a public street and "left it behind for the world to see," he gave up any expectation of privacy in it.

The Court upheld his plea.

SEARCH & SEIZURE – ELECTRONIC EVIDENCE

U.S. v. Powell, 847 F.3d 760 (6th Cir. 2017)

FACTS: The Powells (Carlos and Eric) ran a narcotics/money laundering operation in Detroit for some time. However, a DEA investigation in Arizona "snared a middleman" –

[85] 399 F.3d 750 (6th Cir. 2005)

Morawa. Cooperating, he named Carlos Powell as his "number one" customer. From 2010 to 2016, a large scale investigation ensued. The DEA gathered evidence in several ways, including "obtaining warrants for prospective real-time cell-phone location data; using a cell-site simulator to identify unknown cell phones used by Carlos Powell, Eric Powell, and Juan Valle; placing a GPS tracking device on Eric Powell's Chevy Silverado pickup truck; and monitoring three video cameras installed on public utility poles." The latter were placed near three "stash" houses. Four traffic stops in 2010 yielded drug and millions of dollars in cash evidence as well. Nine search warrants were executed on the same dale, and a vast amount of cash (over 5 million) and drugs were found, as well and guns and related evidence.

The Powells, and Proge, were charged in 2012. In a number of interlocking proceedings, they moved to suppress evidence. It was denied, and they were convicted. They appealed.

ISSUE: Are pole cameras outside the curtilage permitted?

HOLDING: Yes

DISCUSSION: The Court began:

> The Fourth Amendment's exclusionary remedy "encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and, relevant here, 'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.'"[86] However, because Fourth Amendment rights are personal, suppression of evidence as "the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence."[87]

In one of the issues, the DEA had gotten warrants to monitor real-time cell-phone location information – including the cell-site location and GPS data, for six numbers for 30-45 days each. In each, the provider would "ping" the phone and then report its location, when requested. Despite the argument that Powell likely had multiple phones, as indicated by requests for other phones, which did not negate the likelihood that his primary phone might result in the discovery of good information. The Court agreed there was probable cause to issue the warrant.

Next, the DEA "obtained a series of pen-register/trap-and-trace orders between March 11 and November 4, 2010, which purported to authorize the use of a cell-site simulator device to detect and record cell-phone identification information (such as the phone number, serial number, or mobile equipment identifiers) for unknown cell phones that were being used by" the Powells and another man. The Powells argued that using that device could not be authorized under the controlling statute, but the court disagreed and upheld the data.

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[86] Utah v. Streiff, 136 S. Ct. 2056 (2016) (quoting Segura v. U.S., 468 U.S. 796 (1984)); *see also* Wong Sun v. U.S., 371 U.S. 471 (1963).

.[87] McKelvey, 768 F.3d at 495 (quoting Farrar v Hobby, 506 U.S. 103 (1992)).6 [87] U.S. v. Padilla, 508 U.S. 77 (1993) (per curiam) ("Co-conspirators and codefendants have been accorded no special standing.").

Next, in 2010, the DEA had used evidence from the placement, without a warrant, of a GPS tracking device on Eric Powell's truck. This occurred before the Jones[88] case, in which the court ruled that placing a device could be a physical intrusion. At the time, Knotts and U.S. v. Fisher were precedent.[89] The Court agreed that the Leon good faith exception applied, and upheld the evidence derived from that search.

Finally, the Court looked at the pole camera evidence. Although not directed toward the residences of the parties, they were located outside the curtilage of the target properties. The Court agreed there was "neither physical intrusion nor violation of any reasonable expectation of privacy."[90]

The Court affirmed the denials of the motion to suppress, affirmed the convictions of the Powells. (Proge's conviction was vacated for unrelated reasons.)

U.S. v. White, 2017 WL 633386 (6th Cir. 2017)

FACTS: During a lengthy investigation in Detroit, agents executed a search warrant on White's home. They recovered cash and drug evidence, and a handgun, from a locked safe in White's bedroom. Additional investigation used a wiretap on his cell phone and state search warrants to track the location of the phone. The wiretap resulted in a number of incriminating conversations. As a result, a search warrant for White's home was obtained.

White was present and was taken to the Detroit DEA office for questioning. He waived his Miranda rights and admitted the safe was his, but denied that the gun, found in the safe, belonged to him.

Ultimately, he was arrested in 2013. After lengthy negotiations he stood trial and was convicted of drug trafficking. He appealed.

ISSUE: Does one have an expectation of privacy in data from phones they do not own?

HOLDING: No

DISCUSSION: White argued that the tracking warrants were improper. The Court noted, however, although they were faulty, that the Leon good-faith exception saved the evidence. However, since no tracking evidence was introduced against him, from his own phone, but only other phones, he did not have an expectation of privacy in that information.

White also argued there was insufficient evidence concerning his ownership of the gun, but the court agreed that he had dominion over the bedroom where the safe was found. He clearly knew the combination although he did not provide it, as he admitted he knew what it contained precisely (with the exception of the handgun.)

The Court upheld his conviction.

[88] U.S. v. Jones, 132 S.Ct. 945 (2012).
[89] 745 F.3d 200, 201 (6th Cir.).
[90] U.S. v. Houston, 813 F.3d 282 (6th Cir.).

INTERROGATION

U.S. v. Davis, 2017 WL 1135734 (6th Cir. 2017)

FACTS: On January 26, 2014, Officer Burford (Memphis PD) was flagged down by two men who were out of gas. He took one of the men to a gas station where he borrowed a gas can, and the officer returned him to the car. About 30 minutes later, the same man returned to the store and robbed it. He also forced the clerk to perform oral sex on him. He then robed a second convenience store, joined by another man. The clerk saw their vehicle as well.

Memphis PD received a tip that Davis was the younger of the two robbers, the one who appeared on surveillance video in both locations. He was given his Miranda rights and signed a waiver. He denied being under the influence as well. He confessed to both robberies but would not admit to the sexual assault without seeing the video.

Davis was charged with robbery and using a firearm in a crime of violence under federal law. He moved to suppress, arguing he was high on drugs at the time he was questioned. Det. Switzer, who did the interview, said he saw no indication of impairment. Davis said he told Switzer what he'd taken (marijuana and pills) and that he felt numb and lazy as a result. The Court denied the motion to suppress.

The court also allowed for all the charges to be tried together. Davis was convicted and appealed.

ISSUE: May a valid statement be taken from someone impaired by drugs?

HOLDING: Yes

DISCUSSION: Davis returned to his argument that he was incapable of a valid Miranda waiver because he was high when he was questioned. The Court noted that Davis understood his rights and exercised that right when he refused to talk about the sexual assault. Even if he was high, there was no way for Switzer to know that under the circumstances.

The Court agreed his waiver was voluntary.

The Court also agreed that the sexual assault charge was properly combined with the robbery charge, as it helped prove that the clerk who was assaulted had sufficient contact with Davis to identify him.

The Court upheld his conviction.

Williams v. Houk, 2017 WL 244788 (6th Cir. 2017)

FACTS: Williams was given the death penalty for the 1999 aggravated rape, robbery and murder of an 88 year old woman. Over the years since his conviction, he raised a number of different issues through a series of appeals. Relevant to this issue, at the scene of his arrest, officers were approached by Alan Penamon, who identified himself as an attorney. He told the sergeant that he didn't want them to take a statement from Williams until he'd talked to him. The sergeant responded that it was up to Williams to invoke his Miranda rights. During the struggle to arrest him, Williams yelled "Allen" and "that's my attorney Allen."[91]

At the station, Williams orally waived his rights and signed a written waiver. Further discussion indicated he understood his rights. During his time at the station, he made a number of volunteered inculpatory statements that were duly documented. Motions to suppress his statements were dismissed with a finding that he chose to speak to the officers. Following adverse rulings, Williams continued his appeal process.

ISSUE: Must officers respect an untimely request for counsel?

HOLDING: No

DISCUSSION: Among a myriad of other issues, Williams argued that the recording of his custodial interrogation should not have been admitted. The Court noted that "to effectively invoke the right to counsel and trigger the Miranda/Edwards protections, "the suspect must unambiguously request counsel."[92] Whether a suspect has done so "is an objective inquiry."[93] Thus, the suspect must "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." If a suspect's statement "fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect."[94] Moreover, not just any reference to an attorney suffices. Interrogation must cease only when the suspect "has expressed" his wish for the particular sort of lawyerly assistance that is the subject of Miranda. It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.[95]

A subject may also waive their rights, ""provided the waiver is made voluntarily, knowingly and intelligently."

The Court agreed that his yelling at the scene was not an invocation. There was "no evidence here that police actually understood Williams's shouted references to Penamon to be a request for the assistance of counsel, and thus nothing in" prior case law refutes that. A suspect's

[91] The record referred to him as Allen and Allan, but his name is properly spelled Alan.
[92] Davis v. U.S.,512 U.S. 452 (1994).
[93] *Id.*at 458–59 (citing Connecticut v. Barrett, 479 U.S. 523 (1987)).
[94] *Id.* (citing Moran v. Burbine, 475 U.S. 412 (1986))
[95] McNeil v. Wisconsin, 501 U.S. 171 (1991) *(quoting* Edwards, 451 U.S. at 484) (emphasis omitted); see also Barrett, 479 U.S. at 528–29 (holding that the defendant's statement that he was willing to speak with police about the incident in question but would not make a written statement without the assistance of counsel did not preclude the police from questioning the defendant).

Miranda rights only attach when he is both "in custody" and "subject[] to interrogation." Williams was certainly in custody when he called out to Penamon.[96]

It is equally certain, however, that Williams was not being interrogated at that point, because he was not "subjected to either express questioning or its functional equivalent."[97] And Respondent correctly points out that the Supreme Court has "never held that a person can invoke his Miranda rights anticipatorily, in a context other than custodial interrogation."

At one point, Williams said "I don't want this" – which he argued was a request for an attorney. The Court, however, noted that when he was reminded of his rights, he made no move to ask for his attorney. Although he did not know that Penamon was there, he made no request to see him, or anyone else.

The Court upheld his conviction.

42 U.S.C. §1983 – ATTORNEY'S FEES

Hines v. City of Columbus, 2017 WL 253669 (6th Cir. 2017)

FACTS: In a complex excessive force case involving a number of Columbus police officers, Hines was awarded $30,000 in damages. His attorneys then sought fees, for a total of over $300,000. The Court found that unreasonable and adjusted it down dramatically, finding that they achieved "minimal" success as in fact, most of the defendants were dismissed from the case.

Hines appealed on several issues.

ISSUE: Is an attorney fee far in excess of a judgement subject to review?

HOLDING: Yes

DISCUSSION: The Court ruled on a number of issues, but with respect to the attorney fee reduction. The trial court had noted that Hines' judgement was "slight in relation to the hours expended on the litigation," and that he prevailed against only one of the officers. His ultimate judgement was far closer to what the City had offered, by millions, than what he had demanded. In Hensley, the calculation for fees required that the "T]he most critical factor is the degree of success obtained." Indeed, a trial court abuses its discretion when it does *not* consider the relationship between the fee awarded and the success obtained.[98] Considering a rejected settlement offer is one way of measuring the degree of success "Few, if any, reasonable litigants would call a monetary judgment that comes in well under the money offered to settle the case a success." Moreover, when a plaintiff achieves limited success, a fee award based on the lodestar calculation may be excessive, even if the claims are interrelated and nonfrivolous.

[96] Berkemer v. McCarty, 468 U.S. 420 (1984)
[97] Rhode Island v. Innis, 446 U.S. 291 (1980).
[98] See Dean v. F.P. Allega Concrete Const. Corp., 622 F. App'x 557, 559 (6th Cir. 2015).

Even though Hines argued the jury should have given him a higher damages, that was immaterial. The Court in fact noted that it did not reduce the fees or costs as much as it likely could have, given that many of the costs appeared patently excessive.

The Court affirmed the decision.

42 U.S.C. §1983 – CODE ENFORCEMENT

Katz / Markel v. Village of Beverly Hills, 2017 WL 360551 (6th Cir. 2017)

FACTS: During 2005, Katz and Markel (a married couple) were involved in a series of code enforcement dispute involving the condition of their property. At one point, allegedly, the code enforcement officer stated that Katz was a "Jew lawyer." Late in the time frame involved, a neighbor to the couple, built a privacy fence, even though they had been denied a permit to do so, and also allegedly cut down a tree on the Katz/Markel property and took the wood from it. In 2007-08, they complained to the Village about shrubbery a neighbor has planted and that obstructed their driveway view, and then allowed the shrubbery to die, leaving sharp branches. Although the Village agreed it was an issue, it did not cite the neighbor. Finally, that same neighbor installed lights that shined directly in into the Katz/Markel driveway – in that instance, the code enforcement officer simply repositioned the lights himself. In 2012, that neighbor alleged that Katz had "stomped" on her bushes, and he was issued a citation by Bednarz for that destruction. His report indicated that the shrubbery had been cut down. (Other officers had responded to similar complaints earlier, and indicated that Katz would not come to the door when they responded.) Ultimately that citation was dismissed. Another code enforcement officer then issued a notice to the neighbors a month later "because her shrubs were sharp and too tall." That officer was later asked in a deposition if the shrubs had been damaged at that time, she indicated there was evidence of cutting on the side. After several more notices, the bushes were cut down to the required three feet and several removed. The following year, Katz alleged that his car was vandalized with "anti-Semitic slurs" written in a substance that looked like blood.

Katz and Markel sued a number of parties, including the Village of Beverly Hills, over several proceedings; all but the City were dismissed from the case. The crux of the case involved the argument that the non-Jewish neighbors were treated differently that Katz and Markel - and noted for example, that it was impossible for the shrubs to have been cut down, as indicated by the code enforcement officer and then six weeks later, have been too tall, but the court noted that photos attached indicated that a small portion of the shrubbery was down. Katz also argued that while he was given a citation by a police officer, Baker was given only a series of three notices by code enforcement – but it was noted that the charge against Katz was, in fact, criminal. There was also evidence that the report written by Bednarz might have been altered at a later date by an unknown individual

Ultimately, the District Court dismissed all claims, and Katz and Markel appealed.

ISSUE: In a claim against a municipality, must an official policy be shown?

HOLDING: Yes

DISCUSSION: To be successful in a claim against a municipality, it must be shown "that an official municipal policy caused a constitutional violation."[99] Such a custom or policy "can be shown by 'proof of the knowledge of policymaking officials and their acquiescence in the established practice.'" In one allegation, Katz and Markel alleged that the officers Kept logs that should have informed the Village of their actions.

Although the Court agreed that there could have been better investigations, there was no evidence the issue was based in religious discrimination beyond the one, isolated, alleged comment.

The Court affirmed the decision in favor of the Village.

42 U.S.C. 1983 – USE OF FORCE

Woodcock v. City of Bowling Green, 2017 WL 633385 (6th Cir. 2017)

FACTS: On August 12, 2012, at about 1:26 in the morning, a male caller (Harrison) called the Bowling Green PD. He stated he was going to the Louisville Bridge to "beat the hell out of my brother, and if they want me, kill me." Officer Casada was dispatched. A callback to the number identified the caller as "Greg." In a second call, 11 minutes later, the caller, with a slurred voice, claimed he had asked for help and been ignored, and that he was at the parking lot of a convenience store to kill his brother. He claimed to have a weapon, and dispatch duly warned Casada. Ten minutes later, Sgt. Kay spotted Harrison walking on the railroad tracks. She notified dispatch and spotlighted him. As captured on her dashcam, she ordered him to walk to her with his hands up, but Harrison did not comply.

Other officers arrived. Officers Wilson and Casada, alerted to the location by Kay's voice, were first. They took cover behind her cruiser. The area was cordoned off and trains were stopped. Officers Steff and Sgt Porter, along with Officer Kitchens (WKU PD) also responded. During the resulting 12 minute exchange, Harrison ignored verbal commands as he walked up and down the railroad track, he stumbled, had slurred speech and had urinated on himself. He responded "shoot me" to the commands given. He did not make threats or aggressive movements, and did not claim to have a firearm, but did need his left hand tucked in behind his waistband the entire time. He moved out of dashcam range, but there was still audio. At 1:57, Sgt. Kay stated on the radio that if he took one more step in their direction, and was told to tell Harrison that.

Ninety seconds later, Kay reported that he "had apologized to his mother for "whatever it is he's about to do." Casada asked Kay to adjust the cruiser spotlight to keep Harrison illuminated and

[99] Monell v. Dept. of Social Servs. Of New York, 436 U.S. 658 (1978).

she did so. Moments later, Casada shot Harrison in the abdomen, from a distance of 72 feet and a 45 degree angle. Harrison died the next day. Following a KSP investigation, no criminal prosecution was forthcoming.

Woodcock, on behalf of Harrison's estate, filed suit. In relevant part, Casada demanded qualified immunity and was denied. Casada and Bowling Green appealed.

ISSUE: Must a suspect pose imminent harm to justify deadly force?

HOLDING: Yes

DISCUSSION: The Court looked at the reasonableness factors. First, with respect to the severity of the crime at issue, the Court agreed that weighed against Casada, as the underlying crime was minimal. In fact, he'd called the police himself. He also did not actively resist arrest and in fact, there was no actual attempt to arrest him. The final element, and the crux of the issue, was whether there was "probable cause to believe that Harrison posed an imminent threat of serious physical harm to officers or others."[100]

In this case, the Court agreed, the use of deadly force was objectively unreasonable. He showed no aggressiveness, did not point anything at the officers, and the shooting lacked "exigency, tension or rapid evolution." There was no indication of imminent harm to anyone.

The Court also upheld the denial against Kay, who was also sued for failure to supervise and intervene, as those claims were connected to the ones involving Casada. The Court also upheld the denial of dismissal of the Kentucky claims under qualified immunity as well, as Casada's argument were purely fact-based and those unreviewable at this stage.

Estate of Brackens v. Louisville Metro, 2017 WL 679827 (6th Cir. 2017)

FACTS: "A late-night traffic stop in Jeffersonville, Indiana, spiraled into a twenty-minute, cross state car chase that ended" with Brackens being forced from the car. He suffered a fracture to the femur (thigh) and humerus (upper arm). Brackens had been the passenger in a vehicle driven by Sullivan, who was giving him a ride to the store. An officer who ran her plate, becoming suspicious, discovered that Sullivan had outstanding warrants. He called for backup and tried to make a stop, at which point a pursuit began. JPD chased Sullivan up onto a highway, which she entered going the wrong direction, at high speeds. At one point, she tried to ram one of the JPD officers. As she crossed the Ohio River, LMPD officers joined the pursuit.

Brackens called 911, frantically twice, at one point being routed to the New Albany dispatch center. Despite his agitation, he clearly communicated his situation and that he was being held against his will. However, the officers received a different tale, being told through the LMPD dispatchers that both had felony warrants, which Brackens having felony warrants. At some

[100] Sigley v. City of Parma Heights, 437 F.3d (6th Cir. 2006).

point, they were told the female wasn't involved but was "scared to death." They were told both were suicidal and homicidal as well. JPD similarly received incorrect information and at no point, they were told accurate information about Brackens. Finally, Sullivan was stopped. JPD took charge of the driver's side and Sullivan quickly complied. LMPD officers ordered Brackens out but he did not immediately comply. One officer unbuckled him and pulled him to the ground, with Officer Gillock's assistance. He was taken into custody with the help of two other officers. He was pulled up to be searched but could not stand and ultimately, he was discovered to have suffered fractures to the femur and arm – most likely due to existing bone medical issues. He died over a year later from unrelated causes.

Brackens (later replaced by his estate) filed suit, alleging excessive force, against the LMPD officers. (JPD officers were sued in a separate case.) The officer moved for qualified immunity and summary judgement. The Court determined that most of the officers did not make physical contact, and they were dismissed. With respect to those who did make contact, the Court provided qualified immunity.
The Estate appealed.

ISSUE: May force be justified based upon information given to officers, even if it is later learned to be inaccurate?

HOLDING: Yes

DISCUSSION: The court agreed that normally, in a summary judgement, the facts must be viewed from the nonmoving party (the Estate), but that video evidence could also be used. A Fourth Amendment case of alleged excessive force is to be analyzed under the reasonableness standard of Graham v. Connor, and include the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[101] The Court had several opportunities to consider the issue of forcibly removing an occupant of a vehicle following a pursuit. Consistently, the Court had agreed it was proper to do so, due to the overall safety issues. Comparing the case to the facts in Dunn v. Matatall, the court agreed this chase was far more hazardous.[102] Further, the information given to the officers caused them to be even more concerned. Even though much of the information was "wildly and unforgivably inaccurate,' nothing would have caused the officers on the scene to question it. Given the few seconds that elapsed between the stop and the removal, they had little opportunity to understand that "Brackens was disabled and unarmed, let alone that he had no felony warrants and was caught up in the chase involuntarily." In addition, the force used would have been unlikely to have seriously harmed most people.

The Court upheld the grant of summary judgement.

[101] Fox v. DeSoto, 489 F.3d 227 (6th Cir. 2007).
[102] 549 F.3d 348 (6th Cir. 2008).

Estate of Corey Hill v. Miracle, 2017 WL 1228553 (6th Cir. 2017)

FACTS: In June 2013, Hill suffered from low blood sugar and went into a diabetic emergency. His girlfriend, Worrall, called EMS. Two EMS units, with four paramedics, arrived. Finding him disoriented, Paramedic Streeter tried to talk to him, explaining what he needed to do, but Hill was "agitated and combative." He pulled away from Streeter's attempt to do a finger prick for blood. Finally, Streeter was successful, and found Hill's blood sugar to be critically low, at 38. (Such a low blood sugar commonly results in combative behavior, confusion and potentially, life-threatening seizures.)

Deputy Miracle (Oakland County, MI, Sheriff's Office) arrived, as was protocol in such medical calls. He was familiar with the signs of a diabetic emergency as well. When the deputy came into the room, the paramedics were trying to insert an IV to administer dextrose to raise Hill's blood sugar, but Hill was resisting. Streeter finally got the catheter inserted, but a "completely disoriented Hill" swung on Streeter, ripping the catheter out and causing a spray of blood. Streeter continued to try to stop the bleeding while the other paramedics tried to hold Hill down.

Miracle, who at this point, had not yet used any physical restraints, told Hill to relax, to no avail. He told Hill that he was going to use his Taser. He then deployed his Taser in drive-stun mode to Hill's thigh, which caused him to be still long enough for Streeter to get the IV restarted and dextrose into Hill's bloodstream. As soon as it took effect, Hill immediately "became an angel" and was "very apologetic" for what had happened. Hill appeared to be uninjured and recovering from his diabetic emergency, but was transported for evaluation. His blood sugar, by that point, was normal. A minor puncture wound was visible but appeared to need no treatment.

Hill filed suit against Miracle, under 42 U.S.C. §1983, claiming excessive force for the Taser use. He also brought Michigan claims of assault and battery and intentional infliction of emotional distress. He argued that the Taser use worsened his diabetes and that he had a burn on his leg as well. Hill died a few months after filing the lawsuit, from diabetes, and his Estate Representative took over the lawsuit. Miracle moved for summary judgement, which was denied, in major part, by the District Court. Miracle appealed.

ISSUE: May a Taser be used to momentarily subdue a patient in a medical emergency, who is actively resisting life-saving treatment?

HOLDING: Yes

DISCUSSION: Miracle argued that he was entitled to qualified immunity. "Qualified immunity shields "government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" This doctrine "balances two important interests—the need to hold public

officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[103]

In such cases, two questions must be asked: "(1) whether the officer violated the plaintiff's constitutional rights under the Fourth Amendment; and (2) whether that constitutional right was clearly established at the time of the incident."[104] This analysis can be performed in any order.[105]

An excessive force claim also requires the use of the objective-reasonableness test – ""whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[106] The District Court, using the Graham factors, found Miracle's action to be unreasonable, because he had not committed a crime nor was he resisting arrest. However, Graham does not easily apply to a medical emergency, and in fact, the court failed to see the proverbial forest for the trees. The Court noted that it had not previously provided any guidance to the "present atypical situation."

The closest case in the Sixth Circuit, the Court noted, is Caie v. West Bloomfield Township.[107] In that case, the Court held that the use of the Taser against a drug-impaired subject was appropriate. In such cases, the Court agreed that a "more tailored set of factors be considered in the medical-emergency context, always aimed towards the ultimate goal of determining "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them."

> Where a situation does not fit within the Graham test because the person in question has not committed a crime, is not resisting arrest, and is not directly threatening the officer, the court should ask:
>
> (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others?
> (2) Was some degree of force reasonably necessary to ameliorate the immediate threat?
> (3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)?
>
> If the answers to the first two questions are "yes," and the answer to the third question is "no," then the officer is entitled to qualified immunity.

[103] Pearson v. Callahan, 555 U.S. 223 (2009) *(quoting Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).
[104] Kent v. Oakland County, 810 F.3d 384 (6th Cir. 2016).
[105] Pearson, supra.
[106] Graham v. Connor, 490 U.S. 386 (1989).
[107] 485 Fed.Appx. 92 (6th Cir. 2012).

Using its new analysis tool, the Court agreed that Miracle's actions were, in fact, appropriate, as Hill posted an immediate threat to both himself and others. It noted that given that four paramedics had been unable to control Hill, it could not fault Miracle for "not joining the fray." It could also not fault Miracle for his decision to use the Taser in an attempt to minimize the risk of injuring Hill further in a physical altercation.

The Court agreed, "Miracle acted in an objectively reasonable manner with the minimum force necessary" to allow treatment to be administered to Hill. The Court reversed the denial of summary judgement and remanded the case with instructions to dismiss with prejudice.

Littlejohn v. Myers, 2017 WL 1242130 (6th Cir. 2017)

FACTS: On May 3, 2014, Tisdale and Littlejohn entered a Cleveland Family Dollar store, intended to rob it. Littlejohn brandished a firearm. Officers Myers and Haydruk were dispatched to an armed robbery there. They looked through the windows but saw neither suspect, but Littlejohn did see them and fled. He handed the gun to Tisdale before he left but the officers didn't see that either.

Meyers and Haydruk intercepted them outside and the two robbers fled on opposite directions. Littlejohn was caught by Myers, who pulled him off a fence he was scaling. Littlejohn managed to break free and Myers shot him. (At this point, their recitation as to what happened immediately before the shooting differed widely.)

Littlejohn filed suit against the officer and Cleveland under 42 U.S.C. §1983. Myers moved for summary judgement and was denied. Myers appealed.

ISSUE: Does simply having a possible weapon indicate someone is armed and dangerous?

HOLDING: No

DISCUSSION: Myers argument rested on his contention that "it was reasonable for him to believe that Littlejohn was armed at the moment that he shot him." He had not seen Littlejohn hand over the weapon to Tisdale. The Court, however, noted that there was nothing to indicate that Littlejohn ever had a weapon. During the initial struggle, Littlejohn's pants had slid down, exposing his waist and hips, and Myers had done a "hand sweep" during the process as well.

Even had Littlejohn seen a weapon, that did not necessarily mean he was armed and dangerous. He never attempted to do anything other than run. There was, the court indicated, no imminent threat to anyone. The Court agreed, further, that it was clearly established that deadly force was improper under the circumstances.

The Court upheld the denial.

Stephan v. Heinig / West Bloomfield, MI, Township Fire Department, 2017 WL 218881 (6th Cir. 2017)

FACTS: On November 28, 2011, Stephan, who held a black belt, had a grand mal seizure at a local Tai Kwon Do dojo. EMS, firefighter-paramedics, responded to the 911 call, including Heinig. Two of the medics had prior experience with Stephan and knew she could be agitated following a seizure, which was common. The owner was on the phone with Stephan's mother when they arrived, and he gave to phone to one of the medics. That medic, Glashauser, tapped Stephan on the arm, and she struck out, striking him in the leg, as she was just then emerging from her seizure.

Heinig was standing over her, and told her "she could go to jail for hitting Glashauser." Stephan took the phone to talk to her mom, speaking in Chaldean. Paul began to mock her, and Stephan became upset, throwing the phone in his direction. She got up and went to change her clothes, which meant she had to walk toward Paul. Barnes, another medic, took that is a threat and grabbed Stephan's arm, pushing her to the floor. Heinig grabbed her from the other side, applying pressure to Stephan's back to the extent she could not breathe and Stephan screamed in pain as her shoulder was dislocated. Eventually, Heinig let go, and Stephan left with her sister.

Stephan filed an excessive force lawsuit against all parties, and the employer, West Bloomfield. The Court ruled in favor of all defendants except Heinig, in the summary judgement motion, find that she was not entitled to qualified immunity. The trial court used the three Graham factors: "the severity of the crime at issue, whether [Stephan] pose[d] an immediate threat … and whether [Stephan was] actively resisting arrest or attempting to evade arrest by flight." In this case, the Court agreed, a jury could find that Heinig used unreasonable force. Further, when Heinig acted, it could be argued that Stephan was not actively even resisting.

Heinig appealed.

ISSUE: Might a use of force be justified against a person having a medical emergency?

HOLDING: Yes

DISCUSSION: The Court noted that in such claims, the facts must be assessed "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[108] The Court agreed that "under the correct legal standard, Heinig acted reasonably by intervening, because a reasonable officer in her position would have found the intervention necessary." The Court noted that Stephan was experienced in martial arts and had acted aggressively.

The Court reversed the denial of qualified immunity.

Jelsma (Patty / Shane) v. Knox County TN (and others), 2017 WL 244812 (6th Cir. 2017)

[108] Graham v. Connor, supra.

FACTS: On July 28, 2013, Deputy Cox (Knox County TN, SD) and another deputy responded to a domestic disturbance at Jelsma's mother's home. When they arrived, Patty Jelsma came out of the house and stood next to her car. When Officer Cox interviewed her, she began to record the interaction with her cell phone. She claimed that Cox then grabbed her and forced her to the ground, injuring her. Officer Cox charged her with domestic assault, disorderly conduct and resisting arrest." The criminal charges were later dismissed.

Jelsma filed suit for false arrest and excessive force against Deputy Cox, Sheriff Jones and Knox County. Her husband (Shane) filed a lack of consortium claim as well. The court ruled in favor of the deputy on the false arrest claim, but not with respect to the excessive force claim. Cox then appealed that denial.

ISSUE: Is a use of force against someone who is filming justified?

HOLDING: No

DISCUSSION: Deputy Cox argued that the cell phone video established that "Jelsma was not complying with his lawful orders to produce identification and that she turned away from him after placing her cell phone near her chest." The Court noted that the video only showed the camera was turned away, and did not necessarily reflect what Jelsma herself did. The Court agreed that a reasonable officer would know not to use excessive force.

The Court affirmed the denial.

<u>Woodward v. D'Onofrio</u>, 2017 WL 384680 (6th Cir. 2017)

FACTS: Woodward got into an altercation with is uncle, who called the police and reported that Woodward had wielded a baseball bat during the fight. Woodward fled out the back door. Office Kasdorf (Hazel Green, MI, PD) arrived and spotting Woodward, fleeing, on a bicycle, ordered him to stop. Woodward pedaled faster and Kasdorf followed on foot. He radioed D'Onofrio, ahead, in a vehicle, and alerted him to Woodward. D'Onofrio also yelled at Woodward, and pulled up near him, yelling at him to stop.

At this point, their stories differed. D'Onofrio claimed it turned after Woodward, who had pedaled into a parking lot, and lost sight of Woodward, but he felt Woodward run into the front passenger side of the police car. Woodward claimed that he didn't hear the officer and was riding straight on the sidewalk when the cruiser struck him, and he was pinned under the car. He suffered serious ankle injuries.

Woodward filed suit under 42 U.S.C. §1983, arguing that D'Onofrio intentionally rammed him. D'Onofrio denied it. The District Court denied summary judgement to the officer, who appealed.

ISSUE: In a summary judgement motion, must the defendant defer to the plaintiff's recitation of the facts?

HOLDING: Yes

DISCUSSION: The court noted that D'Onofrio failed to defer to Woodward's recounting of the facts, which was required at this state of the proceeding. Instead, he advanced "his version of the disputed event, [drew] interferences in his favor, [cited] case law that assumes an accidental rather than intention crash, and [attempted] to undermine the credibility and sufficiency of Wood's evidence."

Further, in this case, the images from his camera of the aftermath did not contract Woodward's recitation, let alone establish the officers "intent at the time of impact."

The court dismissed D'Onofrio's appeal.

Bohannon v. Town of Monterey (TN) and others, 2017 WL 347442 (6th Cir. 2017)

FACTS: On September 26, 2013, Bohannon was sitting in his car at a fast food parking lot. He had an 18-pack of beer in his possession and had begun to drink as he talked on the phone. His vehicle was suddenly sideswiped and his mirror knocked off. One of the passengers in the other car, Davidson, came out swinging, and Davidson and Cross, the other male passenger, tackled him to the ground. The vehicle then pulled into the drive-through. Bohannon followed them on foot to prevent them from leaving. This time all three got out, including the female driver, Matheney, and began punching and beating Bohannon. At some point, the group moved away from him and as he began to get up, Bohannon collapsed. He did not realize that he'd been shot in the back with a Taser by Officer Durham. Bohannon was taken to the hospital, and then released.

Bohannon filed suit against the city, Durham and others. When deposed, Durham stated he found Bohannon lying, apparently knocked out, on the street, and then when he stood up, he was stumbling about and almost fell in the roadway. Bohannon sat down when ordered but got up again, against orders, Durham tased him. The three in the other car gave yet another version, making Bohannon the aggressor but essentially agreed with Durham as to Bohannon not responding to orders and being tased.

The District Court gave Durham qualified immunity, which then dismissed the city. Bohannon appealed.

ISSUE: In a summary judgement motion, must the defendant defer to the plaintiff's recitation of the facts?

HOLDING: Yes

DISCUSSION: The Court noted that the first issue in this case was determining whose version was to be used in reaching its decision. The District Court suggested that Bohannon had no

memory of what had occurred in the parking lot, for some period of time, but his statements seemed to contradict that, as he stated at no time was he "knocked out."

Using Bohannon's recitation of the facts, the Court agreed, it was "manifest that the force used by Durham was unreasonable." Being tased while trying to get up after being beaten would, objectively, have violated his civil rights. At this point, the Court was obligated to give credence to Bohannon's version. The Court agreed that it was "entirely possibly that Durham's account of what happened on September 26 is wholly accurate, and Bohannon was in such shock that he did not recall stumbling around after the second altercation." But that was not enough to overcome the presumption, and as such, the Court reversed the summary judgement against Bohannon and remanded the case.

Jackson v. Washtenaw County, 2017 WL 416973 (6th Cir. 2017)

FACTS: On August 20, 2010, Detective Marocco (Superior Township, MI) was investigating Jackson for drug trafficking. He parked down from where Jackson was standing, in his mother's driveway, and observed multiple people approach and interact with Jackson. He handed items to two people. Det. Morocco contacted Deputy Urban and advised him to contact Jackson and the man currently with him. Deputy Urban, along with Deputy Mercure, arrived in uniform and did so. Deputy Urban was wearing a body microphone. He asked Jackson what was going on and to "come here a second" – whereupon Jackson clutched his waistband and said he "didn't do it." He fled into his mother's house, with his hands still near his waistband. Urban pursued, and had his Taser out, ordering him to stop. Jackson stopped and turned, and Urban Tased him. He tried to handcuff him but Jackson was rigid. He and Mercure separate put cuffs on Jackson's hands. They then realized the Jackson was not blinking, was locked up and was salivating. They told him to relax and Jackson started resisting again, shouting incoherently as they tried to handcuff him. Mercure drivestunned Jackson in the upper back. Deputy Farmer arrived and assisted in trying to get him handcuffed. Mercure apparently drive stunned him again.

At one point in the struggle, Farmer's arm became trapped close to Jackson's face and she thought Jackson was going to bite her. As he made contact with her arm, she punched him and told him "don't bite." Deputy Reich arrived and tried to restrain him, but the struggle continued. Urban tased Jackson again. Finally, they were able to get him handcuffed – in fact with the two sets of cuffs hooked together. He continued to twist, spit and yell. They searched Jackson, finding cocaine, money and a DOC tether on his ankle.

EMS arrived, and put an oxygen mask (not connected to the tank) over his face to prevent spitting. When Urban tried to take his picture, and removed the mask, he began to spit. His conduct prevented paramedics from assessing his condition. He continued his agitated behavior at the hospital, and spat at the doctors, security personnel there restrained him. (Jackson stated he could not breathe, but the doctors noted his breathing was unlabored.) Ativan was administered to calm him. Two minutes later he went limp and could not be resuscitated. His cause of death was indicated to be cardiac arrest from preexisting heart

disease along with a stress reaction, with the Taser application noted as a potential contributor to the stress.

Jackson's Estate Administrator (his mother) filed suit under 41 U.S.C. §1983, alleging excessive force The trial court ruled in favor of the officers and the county and the Estate Administrator appealed.

ISSUE: Must each use of force be assessed separately?

HOLDING: Yes

DISCUSSION: The Court noted that "the question in this case is whether Jackson was actively resisting arrest." The Court agreed that it had "long distinguished active resistance by arrestees from passive resistance." Specifically "when a suspect actively resists arrest, the police can use a taser (or a knee strike) to subdue him; but when a suspect does not resist, or has stopped resisting, they cannot."[109] Each strike or tasing had to be separately assessed, and in this case, the Court looked at the facts between each use of the Taser. It noted with approval that they did not Tase when they realized his resistance was not due to his own actions, that he could not move briefly. The Court agreed that in each instance, the use of force was appropriate.

The Court upheld the District Court's decision.

42 U.S.C. §1983 – TRAFFIC STOP

Folks v. Pettit / City of Cleveland / John Does 1-5, 2017 WL 318773 (6th Cir. 2017)

FACTS: On October 27, 2012, Officer Pettit (Cleveland, OH, PD) pulled over Folks, Folks asked why he had been stopped which "appeared to agitate Pettit." Pettit demanded Folks' license and registration, which was provided, and he again asked for the violation. He got no answer. When Pettit was running his information, Folks, "feeling so threatened by Pettit's demeanor and tone of voice," decided to call 911. However, when Pettit came back, Folks disconnected. Folks was handed a citation to sign and was told his license was suspended. He said he didn't feel comfortable signing because he didn't believe that was the case. At that point "all heck broke loose," with Pettit ordering him out of the car. Pettit pulled Folks from the car, took him by the arm and marched him to the rear of the vehicle. He slammed Folks head first into the vehicle, causing his upper body to hit the windshield.

Folks was arrested and held in custody for seven hours. He went to the hospital when released. It was later shown that since his license was in fact, not suspended, the case was dismissed. Folks then filed suit against Pettit, Cleveland, and other unnamed officers. The district court denied Pettit's demand for summary judgment, and Pettit appealed.

[109] Rudlaff v. Gillispie, 791 F.3d 638 (6th Cir. 2015).

ISSUE: In a summary judgement motion, must the defendant defer to the plaintiff's recitation of the facts?

HOLDING: Yes

DISCUSION: The Court noted that at this state, it was required to accept Folks' statements as true. As such, the question must be, whether it was "objectively unreasonable for a police officer to pull a cooperative, nonviolent person from his vehicle and slam him into his vehicle hard enough to produce visible injuries." The Court agreed:

Folks did not escalate what was otherwise a routine traffic stop into a contentious one. He complied with all of Pettit's commands, promptly pulling over, producing his documentation, and attempting to open the door. He was not verbally aggressive to Pettit, but merely inquired why he was being stopped and, when he was ordered to sign a citation, tried to explain to Pettit that there must be a mistake.

The Court agreed also that making an arrest or investigatory stop "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[110] However, that "is not a license to inflict 'gratuitous violence.'"[111] The Court noted that while there was "no indication" his injuries were "severe or permanent, there was also no reason for inflicting them."

The Court noted that:

> None of the traditional excessive-force factors weigh in Petitt's favor. He stopped folks for a minor civil infraction, and Folks was compliant and non-aggressive.

There was nothing urgent that required such a response, Folks simply questioned the reason for the stop and suggested a possible mistake. The Court noted that there was no reason to yank Folks from a car when he was already complying, or to slam him against a vehicle. The Court did not accept Pettit's argument that he was using a standard technique to "pin" Folks against the car, but the Court noted that a jury could find that "pinning" does not produce such injuries. The Court found no reason to differentiate the "snatch" from the car with the "slam" against the car, finding that they "happened as part of a single, fluid movement."

The Court upheld the denial of summary judgement at this stage.

42 U.S.C. §1983 – ARREST

Harmon v. Hamilton County, Ohio, 2017 WL 76963 (6th Cir. 2017)

FACTS: On October 20, 2009, about 1:15 a.m., Harmond was driving through Hamilton County, Ohio. He reportedly had no memory of the drive, and believed, later, that "he was suffering a diabetic low blood sugar episode, also referred to as a hypoglycemic reaction, during

[110] Graham v. Connor, supra.
[111] Morrison v. Bd. Of Trs. Of Green Twp., 583 F.3d 394 (6th cir. 2009).

the time of the incident." According to Harmon, "his cognitive reasoning is diminished when he has an episode, that he is unable to understand when people speak to him, and that he feels like he is 'in a cloud.'"

Deputy Wolf spotted the Harmon vehicle come to an "abrupt, erratic, screeching stop" at an intersection and then accelerate away. It had only one working headlight. The deputy estimated Harmon was speeding and made a traffic stop, which resulted in Harmon driving off the road and into a grassy area. Deputy Wolf pursued Harmon who made no effort to stop. Officer Wissel (Anderson Township) joined in the pursuit and believed, from the plate, that it could be stolen as it belonged to a business. Deputy Haynes then also joined in the chase. Harmon finally stopped, as did the officers, who had guns drawn. Harmon drove a bit farther, slowly, and stopped again. The investigation later indicated the chase was at low speeds. Harmon did not respond to orders to get out of the car, but just sat, and eventually, Officer Wissel tried to break the window. (There was some suggestion that the door may not have actually been locked.) When the glass broke, Harmon moved his hand inside his coat, and Wissel used his Taser, to no effect. Harmon "batted and swatted" at Haynes when he tried to undo the seat belt, and Wissel used his Taser in drive stun mode. Haynes also Tased Harmon, but no effect was observed.

Trooper Sanger (Ohio State Highway Patrol) arrived as they were trying to get Harmon from the car, but Harmon was trapped by the seat belt. Wissel finally cut the belt and Harmon was removed. He did not comply with orders to get on the ground and Haynes tried to leg sweep him, then tased him again. They struggled to handcuff him, although he was not actively fighting or resisting. Deputy Cox, who arrived, was finally able to secure the handcuffs. It was later discovered Harmon's elbow was dislocated and he had cuts and scrapes.

In the subsequent investigation, EMS discovered Harmon was diabetic and had a glucose level of 52, after glucose was administered. At the hospital, he was not allowed to use the restroom and urinated on himself while waiting at triage. He required surgery for his elbow. Upon a call to a supervisor, Sgt. Stuckey was told to arrest Harmon, and did so. The charges were later dismissed.

Harmon filed suit against all parties under 42 U.S.C. §1983, claiming false arrest, excessive force and malicious prosecution. The officers moved for qualified immunity and for the most part, were denied. The officers appealed.

ISSUE: To succeed in a false arrest claim, must the subject show a lack of probable cause?

HOLDING: Yes

DISCUSSION: "In determining whether a law enforcement officer is shielded from civil liability due to qualified immunity, this court typically employs a two-step analysis: '(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right

has been violated, and (2) whether that right was clearly established.'"[112] "These questions may be answered in either order."[113] If the answer to either one is "[no] then qualified immunity protects the officer from civil damages."

First the Court looked at the Fourth Amendment issues. With respect to the Excessive force claim, "Under the Fourth Amendment, "[t]he police must act reasonably when seizing a person."[114] "To determine whether the use of force was excessive for purposes of the Fourth Amendment, 'we employ an 'objective reasonableness' test, which requires consideration of the totality of the circumstances.'"[115] "This reasonableness inquiry presents the overarching question of 'whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.'"[116] "The inquiry assesses 'reasonableness at the moment' of the use of force, as 'judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'"[117] "Determining whether the amount of force was reasonable 'requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.'"

> Three factors—also known as the Graham factors—inform this inquiry, although the factors are by no means exhaustive: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. "Ultimately, the court must determine 'whether the totality of the circumstances justifies a particular sort of seizure.'"

In the officers' case, the Court noted that in their motion, they relied "on disputed facts at every point in their argument." For example, the Court pointed to the dispute as to whether the door was locked or unlocked. This was precisely the "type of prohibited fact-based challenge" that the Court could not consider at this point in the case. There was also the question as to ether Harmon was actively resisting or not, or if something else "precluded Harmon from complying with the orders and commands." The Court noted that the facts suggested that the "officers' uncoordinated efforts to handcuff Harmon" might have caused the problem, not Harmon's own actions. Other facts were argued as well, such as whether he was deliberately trying to prevent handcuffing or whether he was simply unable to do so because of the weight of the officers on his body.

The district court had "reasoned that the facts, if proven at trial could show that Defendants "continued to tase him multiple times for not obeying their verbal orders, but their physical actions impeded his ability to comply." On appeal, Defendants noted that Wissel testified that he deployed the Taser to "counteract the possible production of a weapon."

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[112] Smoak, 460 F.3d at 777 (quoting Estate of Carter v. City of Detroit, 408 F.3d 305 (6th Cir. 2005).
[113] Goodwin v. City of Painesville, 781 F.3d 314 (6th Cir. 2015).
[114] Rudlaff v. Gillipsie, supra.
[115] Eldridge v. City of Warren, 533 F. App'x 529 (6th Cir. 2013) *(quoting* Kijowski v. City of Niles, 372 F. App'x 595 (6th Cir. 2010).
[116] Id.
[117] Goodwin, supra.

The Court dismissed the appeal on that issue.

With respect to the false arrest claim, the Court noted, Harmon must prove a lack of probable cause. ""A police officer has probable cause only when he discovers reasonably reliable information that the suspect has committed a crime."[118]

Furthermore, "in obtaining such reliable information, an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence. Rather, the officer must consider the totality of the circumstances, recognizing both the inculpatory *and* exculpatory evidence, before determining if he has probable cause to make an arrest." "While officers cannot ignore exculpatory facts in reaching a probable cause determination, it is *not* the rule that they must investigate a defendant's legal defenses prior to making an arrest."[119] Indeed, "[e]ven if the circumstances suggest that a suspect may have an affirmative defense, if a reasonable officer would not 'conclusively know' that the suspect is protected by the defense, then he is free to arrest the suspect provided there is probable cause to do so."[120] A determination of whether probable cause existed requires us to examine the totality of the circumstances, and we may "consider only the information possessed by the arresting officer at the time of the arrest."[121] "A finding of probable cause does not require evidence that is completely convincing or even evidence that would be admissible at trial; all that is required is that the evidence be sufficient to lead a reasonable officer to conclude that the arrestee has committed or is committing a crime."

The Court agreed that the Sixth Circuit had "taken seemingly inconsistent views as to whether the existence of probable cause is a question of fact or law." However, it concluded "that there are factual questions *underlying* the probable-cause determination—separate and apart from the issue of whether probable cause is either legal or factual in nature—that preclude our ability to exercise jurisdiction over the false-arrest claim." To determine that required an examination of the elements of the charged crimes, and that required an assessment of facts, not permitted at this juncture.

Finally with respect to malicious prosecution, the Court noted:

> The elements of a malicious prosecution claim under Sixth Circuit law are as follows: (1) the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute; (2) because a § 1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution; (3) the plaintiff must show that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty, as understood in [this court's] Fourth Amendment jurisprudence, apart from the initial seizure.

[118] Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).
[119] Fridley, 291 F.3d at 874 (emphasis added) (internal citation omitted).
[120] Young v. Owens, 577 F. App'x 410 (6th Cir. 2014) (alteration in original) (quoting Fridley, 291 F.3d at 873).
[121] Harris v. Bornhorst, 513 F.3d 503, 511 (6th Cir.), *cert. denied,* 554 U.S. 903 (2008).

(4) the criminal proceeding must have been resolved in the plaintiff's favor.[122]

The Court noted that "the existence of probable cause forecloses a finding of malicious prosecution."[123] Since at this point, there is a factual dispute about probable cause, the malicious prosecution claim could not be addressed.

The Court dismissed the appeal.

Fry v. Robinson, 2017 WL 416974 (6th Cir. 2017)

FACTS: In the spring of 2012, Officer Robinson (Goshen Township, OH) met with a 14 year old girl, J.P., at the hospital. She was being treated for psychological issues connected to prior sexual relationships with adult men she'd met online. With her consent, Robinson posed as her, using her social media accounts, to investigate such men. He began to communicate with Fry, through July 2012. After a text interchange, they discussed meeting, but Fry consistently refusing to meet until he saw "her" on Skype. He finally called the number he had been texting and learned the Robinson was an officer. They had further communications until he realized that Robinson would be charging him with sex offenses. At that point, there was no further communications.

In October, he submitted paperwork to start the process, asking for felony charges, but the prosecutor opted for misdemeanors instead. Robinson chose to go forward with the felony charges, however. Fry was arrested in March, 2014. He declined an offer of a misdemeanor, and the prosecutor elected to dismiss the charges. Fry, in response, filed paperwork asking for five felony charges, but nothing further was done. Fry's arrest was expunged.

Fry brought suit under 42 U.S.C. §1983, alleging false arrest and malicious prosecution. Fry requested summary judgement. During discovery, Robinson acknowledged the above facts and the court denied summary judgement. The Court also noting that "importuning [the state charge] requires that an accused ask for sex" – but in looking at the messages, it appeared the Robinson was doing the asking.

Robinson appealed.

ISSUE: Must an arrest warrant be based on particularized facts?

HOLDING: Yes

DISCUSSION: The Court agreed that "arrests require probable cause." In such cases where an officer applies for a warrant that is effectively, automatically issued, must exercise such judgement as to ensure that the danger of an unlawful arrest is minimized. In this case, the paperwork submitted was "plainly lacking in … particularized facts" to support the charge. The

[122] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010).
[123] *See* Provience v. City of Detroit, 529 F. App'x 661 (6th Cir. 2013).

Clerk that stamped the document did not, and would not, make an independent probable cause determination.

Further, the Court agreed the malicious prosecution was a separate claim, however. In this case, although it was not proper to ignore the prosecutor's instruction, the court agreed that the charge was in fact, at least possible and he had probable cause to initiate the prosecution. The Court overturned the denial.

42 U.S.C. §1983 – MEDICAL

Barnwell (Estate) v. Grigsby (and others), 2017 WL 416974 (6th Cir. 2017)

FACTS: After Barnwell lost consciousness during a pill (Flexeril) overdose, his fiancée called EMS. Because his fiancée had said he was combative, Officer Grigsby and Sgt. Stooksbury (Roane County SD) were dispatched along with the EMS crew. The officers tried to wake him and he kicked and bit at them, as he went in and out of consciousness. They pinned him to the floor. Paramedic Randle arrived and asked them to handcuff him so that he could start an IV line, and they did so. Gilmore, the fiancée, later testified that the officers were rough with him and slammed him to the floor several times.

As Gilmore was escorted out, Barnwell was given succinylcholine by the paramedics to aid in intubation. Knowing the reason for the overdose, they concluded that they needed to implement the protocol to establish an airway on a combative patient. They were able to intubate, but he began to suffer cardiac symptoms. He was transported when they saw "brown fluid" in the intubation tube. They removed it and did CPR, but he died at the hospital.

The autopsy indicated that Excited Delirium Syndrome (EDS) was the cause of his death. Barnwell's expert later testified that in fact, intubation was unnecessary because he appeared to be breathing on his own, as shown by his fighting. It was noted that they had intubated into his esophagus rather than his trachea, as well.

Gilmore filed suit on behalf of the estate under 42 U.S.C. §1983 against all involved. The trial court found in favor of the county and gave qualified immunity to the officers and paramedics. However, with respect to the decision to administer succinylcholine, the Court agreed that the dispute in the facts precluded it granting summary judgement under the theory of excessive force and a "state created danger." The officers and paramedics appealed.

ISSUE: Might officers have some responsibility for actions of other government actors?

HOLDING: Yes

DISCUSSION: The two officers argued they could not be liable for administering the drug since "they played no role in giving Barnwell the drug." The trial court "inferred the officers could have been involved in this decision." The Court however, noted that they conferred with the paramedics about that their statement in Gilmore's presence that they were "about to knock

him out" implied involvement in the process. Further, their argument that they were acting in a medical capacity was negated by their actions in controlling his combativeness, not treating it. If, as Gilmore argued, they encouraged the paramedics to knock him out, for punitive reasons, it would be a claim, and so long as there was a dispute in the material facts, the court could not rule on the claim.

(The paramedics argued that they followed the RSI protocol "to the letter," but the expert had noted that since he was combative and fighting, his airway could not have been compromised. As such, he did not challenge the protocol, but the need for the intubation.)

With respect to the state-created danger, the court agreed that "governmental entities and officials have no general duty or "affirmative obligation" to protect citizens from private harm."[124] "There are … two exceptions to this rule: the 'custody' or special relationship exception, and the 'state-created-danger' exception."[125] The latter applies when an action by the government "exposes an individual to private acts of violence by either creating danger or causing an individual to be more vulnerable to danger." It must be shown that "a governmental actor put the plaintiff at risk for an injury committed by a private person." However, in this case, the alleged harm was done BY government actors, not private actors. The Court reversed the denial of summary judgement on that issue.

Arrington-Bey v. City of Bedford Heights, 2017 WL 2432389 (6th Cir. 2017)

FACTS: On June 21, 2013 Anita Arrington-Bey drove her son, Omar, to a Lowe's in Bedford Heights to pick up his paycheck. He'd been fired. Nelson, the manager, came over to speak to him, and Omar started speaking nonsense. Nelson knew someone was wrong and tried to guide Omar outside, but he came back inside, demanded his check, and began to kick and throw paint cans. In response to a 911 call, Bedford Heights dispatched Officers Honsaker and Ellis.

The officers spoked the van pulling out, as they arrived. Omar was in the passenger seat and evasive, but calm and compliant when asked to get out. They found pills during a frisk and put them back in his pocket – after being told they were for his psychiatric condition (bipolar). Everyone returned to the Lowe's. Omar "was rambling and ranting and raving about every possible topic he could think of, "and because angry if Honsaker interjected.[126] Both officers learned independently that Omar was not taking his prescribed medication.

Omar was arrested. The officers told Lee and Hill, the intake officers, what had happened. Hill decided to delay booking until Omar calmed down, because the two women were the only correctional officers on duty. He was placed in a segregation room and uncuffed, and when he was told to remove his belt, he "acted like he was performing a striptease." Omar went back and forth between calm and unusual behavior, singing and talking to himself. When escorted to the bathroom, he asked the male officers if they wanted to hold his penis for him. Assistant Chief Leonardi also checked on him.

[124] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).
[125] Willis v. Charter Twp. Of Emmett, 360 F. App'x 596 (6th Cir. 2010); Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).
[126] Among other things, he said his father was the "son of Satan."

The oncoming shift, Officers Mudra and Sindone were briefed as to what had occurred. When offered food, Omar used his hands and spilled food over him. He answered no to a question about medication during the medical screening. Mudra learned about the pills he had in his possession, but not what they were for.

He was allowed out to make a phone call, unhandcuffed, and attacked Mudra, choking him. Police officers rushed him and secured him in a restraint chair, where he collapsed. EMS was called but he died.

Arrington-Bey's mother filed suit on his estate's behalf. The officers received qualified immunity and she appealed.

ISSUE: Does the death of a mentally ill subject in custody indicate clear fault by the officers?

HOLDING: No

DISCUSSION: The Court noted that the officers at the scene knew he was mentally unstable, but there was nothing to indicate that they should have done more than they actually did, documenting and informing the jail of what they knew. With respect to the jail, evening knowing that he was bipolar, nothing suggested he needed immediate medical attention. Nothing suggested he was at risk of a heart attack.

The Court noted:

> Police officers face tough judgement calls about what to do with the mentally ill. Arrestees do not normally arrive at jail toting their medical records. Psychiatric problems do not always manifest themselves with clarity. And not even clear psychiatric problems always reveal their potential for serious harm – as here a heart attack. Although perhaps more training is needed, and more resources, but nothing indicated the officers did anything that required a finding against them.

The Court upheld the dismissal.

42 U.S.C. §1983 – STATE CREATED DANGER

Nelson (Estate of Henry Hilliard) v. City of Madison Heights, 845 F.3d 695 (6th Cir. 2017)

FACTS: On October 19, 2011, Hilliard was at a motel in Madison Heights, MI. Officer Wolowiec was also there, conducting a drug investigation. As he walked by Hilliard's room, he spotted a bag of marijuana through an open window. He called for help and Officer Koehler arrived. The pair did a knock and talk and Hilliard admitted them. They found a bag of marijuana in the bathroom.

Hilliard asked if she could work off the possession charge by setting up a buy with her dealer. As part of the process, she signed a CI form that indicated that although they would attempt to hide her identity, they could not guarantee it would be successful. She was taken away from

the room in case they were not able to catch the dealer (Raquib) before he arrived, which was the plan. At some point, one of the statements made by the officer likely tipped the dealer as to how he had been set up. But, when this was explained to Hilliard, she was not concerned. The officer specifically told her to stay away from Raqib (and Clark, who was with him) and call him or 911 if there was any problem.

Clark later testified that Officer Wolowiec disclosed Hilliard's identity to her, and that she told Raqib. The next day, Hilliard told her mother, Nelson, about what had happened.

On October 23, Bowen drove Hilliard to see a client, as Hilliard worked as a prostitute. After he drove away, she called him and asked him to stay on the line as "something did not seem right." He heard several comments and then the phone went dead. He could not find Hilliard when he returned. Nelson reported Hilliard missing ultimately, her burned and dismembered body was found. It was determined that Raquib and Matthews murdered her.

Nelson filed a lawsuit under 42 U.S.C. §1983 against Madison Heights and various officers. Oakland County and Officer Wolowiec moved for summary judgement, which was denied. The officer appealed.

ISSUE: Do officers have some legal responsibility for their confidential informants?

HOLDING: Yes

DISCUSSION: Officer Wolowiec asserted qualified immunity from the claim by Nelson that Hilliard was subjected to a state created danger. He argued that his actions did not "create or increase the risk of violence that Hilliard faced because she voluntarily became a confidential informant."[127] The Court, however, agreed that her agreement "did not come with conditions that would have put her on notice that her identity would eventually become public under the agreement." The officer did warn her, but in a "speculative" way.

The court looked to the Summar[128] case and noted that in that case, the informant was actively consorting with the same criminals. Hilliard, however, was not, although she was engaging in prostitution at the time. The court noted that Officer Wolowiec did attempt to warn her, which showed he was not indifferent to her wellbeing – but agreed that it was for a jury ultimately to decide if he was deliberately indifferent to her safety.

The Court noted there was no necessity for the officer to disclose Hilliard's identity and that he knew little about Raquib and his potential for hazard. The Court agreed that "a reasonable jury could find that, under the state created danger theory of liability, he engaged in affirmative acts that increased Hilliard's risk of exposure to private acts of violence.

The court upheld the denial of the motion.

[127] Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).
[128] Summar v. Bennett, 157 F.3d 1054 (6th Cir. 1998).

42 U.S.C. 1983 – STRIP SEARCH POLICY

Pecsi v. City of Niles, Michigan, 2017 WL 57797 (6th Cir. 2017)

FACTS: On March 17, 2011, Cross pulled over Pecsi and found marijuana. He arrested Pecsi, strip searched him and locked him into a holding cell by himself. He later removed Pecsi from the cell, took him to the bathroom and forced him to masturbate into the toilet, ostensibly for a drug test. He returned him to the cell, then removed him again, this time forcing him to masturbate into a cup. He attempted to grope Pecsi's genitals. Pecsi was released later that day.

Pecsi reported it and the city investigated. Ultimately, Cross was convicted of criminal sexual conduct. Pecsi filed suit against Cross, the City and the former Chief. He was awarded a substantial judgement against Cross, but dismissed all claims against the City. Pecsi had argued in his response to the City's motion that the strip-search policy was unconstitutional.

Pecsi appealed.

ISSUE: Is the city responsible for a sexual assault committed by an employee when there is no indication of a propensity to do so?

HOLDING: No

DISCUSSION: Pecsi argued that the city had a policy of strip searching everyone arrested for drugs, "without regard to whether the police had reasonable suspicion that the arrestee possessed drugs or other contraband. That was not, however, in itself improper.[129] It is unclear, however, whether the logic of a strip search applies to a police station lockup, as opposed to general jail population. In fact, however, the City did not have such a policy, but just the opposite, as three officers testified that a strip search was only authorized if the officer believes the subject has contraband. Cross testified that he suspected Pecsi still had marijuana in his possession.

With respect to his claim that the City failed to supervise Cross, the Court noted that the "duty to supervise is not a duty to micromanage." Further, even though there was an apparently violation of a Michigan law requiring an officer to do a written report of every strip search, there was no link between writing a report and the misconduct. Although Cross had a speckled history, nothing indicated he had a propensity for committing a sexual assault. The most relevant incident was an accusation of a physical assault on a subject under arrest, but the subject never filed a complaint and the chief only became aware of it after the litigation had proceeded with Pecsi.

The Court affirmed the dismissal of the case against the City.

[129] Florence v. Board of Chosen Freeholders, 566 U.S. --- (2012).

42 U.S.C. 1983 – PROPERTY EXECUTION

Partin v. Davis (and others), 2017 WL 128559 (6th Cir. 2017)

FACTS: The Partins (Mike and Christa, and their company, Mike Partin Trucking) were sued for a vehicle accident. They lost their case and appealed. During the pendency of a motion, the victim's attorney initiated execution proceedings on the judgement, claiming all semi-trailer used in the business.

On January 26, 2015, Deputy Tyler, (Franklin (TN) SO), picked up a stack of papers from the Clerk's Office, including the judgement writ. He verified the document with a deputy clerk, Anderson. He then proceeded to execute the writ. He talked to Christa Partin, who explained the appeal, but he continued with the execution. He asked her for keys so he could take the vehicles without damaging them. He spoke to Mike Partin on the phone and told him that he would have to go to a judge to stop the process.

The Partins cooperated and gave him the keys and the locations of two or three of the trucks. He proceeded to the location of the trucks and with the cooperation of the police department where they were found, made arrangements to move the trucks to a holding location. He made arrangements to seize two more, but before he could do so, the Franklin Circuit Court issued a Temporary Restraining Order. Deputy Tyler obeyed the TRO.

At a hearing, the Court set aside the execution and the Partins retrieved their trucks. They subsequently filed suit against Deputy Tyler and the County, and related parties, under 42 U.S.C. §1983. The Court ruled in favor of the Deputy and other defendants and the Partins appealed.

ISSUE: Is a deputy responsible for following what appears to be a valid writ, when there is in fact a mistake?

HOLDING: No

DISCUSSION: Looking at the claim against Deputy Tyler, the Court agreed that the Partins had sufficient notice and opportunity to be heard in the underlying litigation before the seizure. The Court found no constitutional deprivation as even if there was an issue with the seizure, there were adequate state remedies to address it. They were "rendered whole" by the return of their trucks.

Further, the Court agreed that the deputy did not unreasonably seize the trucks. If it the writ was improperly issued, it was facially valid with respect to Deputy Tyler's actions. Pursuant to Tennessee law, the deputy collected the writ for enforcement. He was under no obligation to investigate the lawfulness of the writ, and he stopped the execution when the TRO was issued

Deputy Tyler also seized two of the trucks outside the county, which they argued was unlawful. The Deputy contended that "Tennessee law does not bar him from cooperating with other

counties' sheriff departments to retrieve personal property owned by Franklin County residents but located across county lines." He seized the trucks with the aid of the Coffee County Sheriff's Office, as was the usual process and in accord with state law.

The Court "made quick work" of a conspiracy claim, as well. The Court further dismissed several parties who were not "state actors," as absent conspiracy with state actors, private citizens are not subject to lawsuit under this statute.

The Court denied the Partins claims.

42 U.S.C. 1983 – MALICIOUS PROSECUTION

Noonan v. County of Oakland, 2017 WL 1102912 (6th Cir. 2017)

FACTS: In June, 2010, Noonan was an attorney in Tennessee. In 2008, he purchased a used car from his brother, and was only given one key. In 2010, the vehicle was almost 10 years old. On the morning of June 18, he discovered the vehicle was missing from his driveway and reported the theft. The officer noted no sign of force (glass, etc.) and that Noonan had the key. Det. Tomasovich-Morton (Farmington Hills PD) was assigned to an auto theft task force.

The vehicle was recovered in Detroit the same day, without a plate but with a key. The driver had hit two parked cars and then abandoned the car and fled on foot. Her report (obtained from Detroit PD) did not indicate any description of the fleeing subject. The key found in the vehicle included a tag and it was then believed, Noonan's security pass card for work, along with other belongings, were still in the vehicle.

When interviewed, she claimed Noonan was nervous and upset. He denied ever having more than one key to the vehicle. Later, she denied having recorded the interviews and stated she shredded her notes, leaving only her after-the-fact report. Noonan's recitation of Noonan's interview different dramatically from hers. In addition, and noteworthy, Morton lost the keys and never photographed them either. In addition, the brother stated that he never said there were two sets of keys shared with his brother and that Noonan likely had only one. (The brother apparently did have another key.)

Realizing he was under suspicion, Noonan retained a lawyer and took a voluntary polygraph, which he passed. (He later took a police polygraph and passed that as well.) Morton in the meantime, urged the prosecutor to charge Noonan with fraud. The prosecutor did so. It was later verified that the identification tag on the key, and the security pass, were not Noonan's. A few months later, the charges were dismissed upon motion of the prosecution.

Noon filed suit under 42 U.S.C. §1983 against Morton, for malicious prosecution. He outlined the evidence undermining any prosecution and the dramatic lack of any investigation. (His own investigation easily proved the information provided was false.) Morton claimed qualified immunity arguing that the final prong of a malicious prosecution case is that the plaintiff

suffered a deprivation of liberty, and Noonan never did, other than posting a personal recognizance bond. The trial court ruled against Morton and she appealed.

ISSUE: Is a faulty arrest that results only in the subject appearing in court a few times sufficient to be a deprivation of liberty?

HOLDING: No

DISCUSSION: The Court noted the issue was whether Noonan was deprived of his liberty. He was never arrested or incarcerated, but did have to attend various court proceedings. The Court however, agreed that such incidental appearances did not rise to the level of a deprivation of liberty and reversed the trial court.

King v. Harwood (and others), 852 F.3d 568 (6th Cir. 2017)

FACTS: On November 5, 1998, Breeden's body was found in the Kentucky River near Lockport. He had been shot twice in the head and his legs were bound. Among other suspects, KSP identified King as a possible suspect; she had a prior romantic relationship with King. Det. Figg and Bess tried to get a search warrant on her home, but could get neither a warrant nor consent. A week later, Sgt. Duncan was able to come inside and saw evidence (bullet holes) in her floor, which she explained. Duncan's notes later indicated he did not believe she was involved in Breeden's death.

The case went cold under Det. Harwood (KSP) was assigned in 2006. During his initial investigation, although he did multiple interviews, he did not record or document them. He sought a search warrant on June 12, 2006, and the affidavit read:

> The affiant is the detective presently in charge of the murder investigation of Kyle "Deannie" [sic] Breeden. The cause of death was apparently two gunshot wounds to the head from a 22 caliber firearm using magnum ammunition. The decedent's legs were bound with a guitar amplifier cable. The decedent was found floating in the Kentucky River at the separation point between Henry and Owen Counties.
>
> On November 3, 1999, two 22 caliber bullet [sic] holes were seen in King's kitchen floor by a state police detective. This information was provided by Susan King and she stated that the holes were from a 22 caliber weapon and was caused as a result of a domestic altercation with "Bo", a motorcycle guy. This happened according to her three to six years before 1999. King stated that Breeden had sold or pawned the weapon some time before and she has no knowledge of it [sic] location or whereabouts.
>
> Prior to the finding of the decedent's body Susan King told Debbie Jordan, Ronnnnie [sic] Haydon and Mildred Breeden that she had had dreams or premonitions that Breeden being found in water. These conversations were confirmed by interviews in 1998 and 1999. Susan King and Breeden were good friends and lovers in the weeks

prior to his disappearance. Breeden had stated that King had taken $300.00 from him. (See sep. sheet for continuation)

Continuation sheet:

Breeden had stated to individuals that he would get his money back and further that he had told his mother, Mildred Breeden, that King had some of his property and that he would get it from her. Breeden and King were good friends with Ronnie Haydon and Jackie Callahan (now the wife of Ronnie Haydon) who only lived one to two miles from Susan King. A prior boyfriend of Callahan had found large bleach stains in Callahan's car two to three weeks two weeks [sic] or so after Breeden's death. This was confirmed by Detective Bess.

Susan King plays the guitar and this fact was confirmed by interviews with Larry Mobley, Ronnie Haydon and Shawn Wright. Decedent was bound at the legs with a [sic] amplifier/guitar cord.

Fragments of the bullits [sic] that killed Breeden were recovered and are available for comparison with other samples.

Acting on the information received, Affiant conducted the following independent investigation:

May 31, 2006 Susan King was again interviewed and at her residence a guitar, an amplifier and other musical instruments were observed at King's residence.

The affidavit omitted certain information, including that the wounds in Breeden's head were non-exiting and most important, that King had only one leg (and no prosthetic at the time) and weighed 100 pounds, while Breeden weighed 187. This made it highly unlikely that she killed him, tied him up, dragged him to her car, drove 40 miles and then dumped him off a bridge into the river.

Harwood received the search warrant. While two other troopers executed the warrant, King alleges that Harwood directed King to go for a drive with Harwood, saying, "If you don't get in my car, I will take away your crutches, handcuff you, and drag you across that gravel driveway and put you in my car." King alleges that Harwood drove around recklessly for most of the six hours during which the other troopers searched King's home.

The bullets recovered from her floor were different from those that killed Breeden. Harwood got a second warrant and recovered 130 bullets from trees in her yard, and additional testing was made in the house. Forensic examination failed to link any of the evidence found to Breeden's murder.

Despite this, King alleges that Harwood made a report to the Commonwealth's Attorney identifying King as Breeden's killer and setting forth his theory of the murder. According to King, Harwood's report included "his theory that King shot Breeden in her kitchen, dragged his body out of her home, placed Breeden into her vehicle, then drove Breeden to Gratz's bridge, and finally, removed Breeden's body from the vehicle and threw it off the bridge," after which "King went home and cleaned up the crime scene, including scraping away a layer of linoleum on her kitchen floor." A KSP lab report indicates that no cleaning solvents were identified on King's floor."

He testified before the grand jury and allegedly, made false statements.

> Specifically, King alleges that Harwood testified that there were four rather than two bullet holes in the floor; that "no comparison could be made regarding the bullets found in King's floor against the bullets found in Breeden's skull" when in fact Harwood knew that a comparison had been made and that the bullets were not the same; and that King's telephone behavior changed after Breeden's disappearance (that is, that King previously called Breeden repeatedly but stopped calling after he disappeared, indicating that she may have known he was dead if not that she caused his death) when in fact King rarely called Breeden in the first place (instead, Breeden frequently called her). According to King, Harwood also omitted the fact that King was missing a leg at the hip.

King was indicted and Harwood arrested her. He then got an indictment for Tampering with Physical evidence, testifying that "King alleges that Harwood "falsely testified that King dragged Breeden's body across the floor to her back door, and afterwards, she cleaned up the scene" even though "Harwood was aware at the time he testified that KSP's Lab determined that no cleaning solvents were found on the kitchen floor." King was indicted for tampering with physical evidence on June 7, 2007.

The following year, King ended up taking an Alford plea.[130] She later alleged that "Harwood told her "that he would make sure she spent the rest of her life in jail if she decided to go to trial and, on several instances, told King that she would get the electric chair."

In 2012, Jarrell, a serial murder, confessed to a Louisville Metro detective that he'd killed Breeden. He gave specific details to Det. Morgan, in exchange for leniency for a family member facing unrelated charges. Det. Russ recorded one of the interviews. Harwood refused to talk to LMPD, but did visit Jarrell and allegedly "intimidated Jarrell into recanting his prior confession." Jarrell then refused to talk further. Harwood's interview with Jarrell went missing. Det. Barron forwarded information to the Kentucky Innocence Project, which was already working King's case. After an appellate proceeding, her plea was vacated and the Spencer Circuit Court dismissed the charges.

[130] North Carolina v. Alford, 400 U.S. 25 (1970)

King filed sued under 42 U.S.C. §1983 and Kentucky law against Harwood and others. The District Court ruled against her, and King appealed.

ISSUE: May a subject who took an Alford plea still file a lawsuit?

HOLDING: Yes

DISCUSSION: The Court first looked at certain procedural issues related to the sufficiency of the pleadings, and whether the allegation of malicious prosecution was barred by Heck v. Humphrey. The Court agreed that "When the Kentucky Court of Appeals granted King relief, it vacated her Alford plea, but it did not result immediately in a "termination of the . . . criminal proceeding in favor of the accused," as Heck[131] would require for the limitations period to begin. Rather, King's case was remanded for trial on the same charges that formed part of the malicious prosecution for which King now seeks relief. Accordingly, the one-year statute of limitations period did not begin until October 9, 2014, when King's indictment was dismissed, and King's complaint—filed October 1, 2015—is timely under Heck." As such, her case was not time-barred.

> In Sykes v. Anderson,[132] we articulated the elements of a § 1983 claim for malicious prosecution: "(1) a criminal prosecution was initiated against the plaintiff, and the defendant made[,] influenced, or participated in the decision to prosecute; (2) there was a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty, as understood under Fourth Amendment jurisprudence, apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor."[133] We recognized in Sykes that "malicious prosecution" was a misnomer: unlike the common-law tort of malicious prosecution, which has malice as an element, we noted that the constitutional tort of malicious prosecution that is actionable in our circuit as a Fourth Amendment violation under § 1983 does not require a showing of malice at all, and might more aptly be called "unreasonable prosecutorial seizure." Nevertheless, we continued to call the constitutional tort "malicious prosecution," concluding that we were "stuck with that label" in part because of its use by the Supreme Court and other circuits.

The Court noted that King's Alford plea did not indicate she was conceding probable cause. The Court noted:

> Giving King all reasonable inferences from the factual record, Harwood knew that King's gun could not have fired the bullets that killed Breeden (and no evidence of record links King to the weapon that did), Harwood knew that the bullet holes in King's floor were not caused by the bullets that killed Breeden, and the only evidence Harwood had to go on was King's premonitions that Breeden would be found "in water," King's prior relationship with Breeden, and the fact that King owned a guitar and an amplifier. There

[131] Heck v. Humphrey, 512 U.S. 477 (1994).
[132] 625 F.3d 294 (6th Cir. 2010).
[133] Sanders v. Jones, 845 F.3d 721 (6th Cir. 2017) (citing Sykes, 625 F.3d at 309–10).

was no physical evidence tying King to the crime, no eyewitness evidence, and at best a weak motive, to the extent that King and Breeden's $300 dispute would provide one. All this was known to Officers Figg and Bess who were unable even to obtain a search warrant for King's house. Thus, in light of the fact that all reasonable inferences must be given to King at the summary-judgment stage, the district court erred in holding that King would be unable to prove the requisite lack of probable cause to win her malicious-prosecution claim.

Individuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has "made, influenced, or participated in the decision to prosecute the plaintiff" by, for example, "knowingly or recklessly" making false statements that are material to the prosecution either in reports or in affidavits filed to secure warrants.[134] Here, the district court erred in failing to draw all reasonable inferences in favor of King, as it is required to do at summary judgment. Giving King all reasonable inferences from the factual record, Harwood knew that King's gun was not the murder weapon (and no evidence of record links King to the weapon that bullets that *did* kill Breeden); Harwood knew that the bullet holes in King's floor were not caused by the bullets that killed Breeden; and the only pieces of evidence that Harwood had to go on were (1) King's premonitions that Breeden would be found "in water," (2) King's prior relationship with Breeden, and (3) the fact that King owned a guitar and an amplifier. Defendants cite no caselaw to support the proposition that this evidence, without more, can sustain a conviction for murder—or that any reasonable officer would believe that it could. Moreover, Defendants do not appear to contest the assertion that when Harwood sought search warrants for King's home, he was armed with no more evidence than what was known to Officers Figg and Bess at the time of the initial investigation, and those officers were unable even to obtain a search warrant, let alone an indictment for murder.[135]

The Court agreed that the lawsuit could move forward.

The Court also addressed a related argument that Harwood should have absolute immunity for his grand jury testimony. The Court, however, noted that in Rehberg, "falsifying affidavits and fabricating evidence would constitute unprotected acts."

The Court continued:

[134] Webb, 789 F.3d at 660 (holding officer violated clearly established right to be free from malicious prosecution by fabricating evidence that defendant was a drug dealer); Smith, 1996 WL 99329 at *4–5 (holding reasonable police officer would have known that seeking felony warrants and making "efforts to get the Commonwealth Attorney to convene a grand jury" when probable cause was lacking violated clearly established constitutional rights); *see also* Malley v. Briggs, 475 U.S. 335 (1986) (affirming lower court's holding that "an officer who seeks an arrest warrant by submitting a complaint and supporting affidavit to a judge is not entitled to immunity unless the officer has an objectively reasonable basis for believing that the facts alleged in his affidavit are sufficient to establish probable cause").

[135] *Cf.* Buckley v. Fitzsimmons, 509 U.S. 259, 261–62, 274–75 (1993) (holding that a prosecutor was not entitled to absolute prosecutorial immunity where, after a special grand jury initially declined to return an indictment following an eight-month investigation, the prosecutor called a press conference at which he made statements falsely implicating the petitioner and then sought and received an indictment against the petitioner despite lacking any new evidence to support a finding of probable cause).

> We hold that where (1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence;
> (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and
> (3) the false statements, evidence, and omissions do not consist solely of grand jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury), the presumption that the grand-jury indictment is evidence of probable cause is rebuttable and not conclusive. This exception to the presumption of probable cause finds support in Supreme Court case law, in our precedent, and in the decisions of our sister circuits and the district courts.

The Court looked to the recent case of Manuel v. Joliet,[136] considered and rejected the argument that either a judge's finding of probable cause or "a grand jury indictment or preliminary examination" forecloses a Fourth Amendment claim arising from unlawful pretrial detention." If the grand jury proceeding is tainted by fabricated evidence, then the detention becomes unlawful. Further when the individual is a "complaining witness" – who set the prosecution wheels in motion – they are not accorded the immunity of a grand jury witness.

The Court concluded:

> But an officer's actions of wrongly setting a prosecution in motion or falsifying or fabricating evidence may be material to the grand-jury indictment *even though* they do not constitute "testimony" or related preparation for testimony, and nothing in the case law indicates that such actions somehow *mutate into* grand-jury testimony simply because they are material to the return of an indictment.[137] Thus, evidence of an officer's actions prior to and independent of his grand-jury testimony may call into question the presumption of probable cause created by an indictment even if a malicious-prosecution plaintiff may not bring in evidence of the grand-jury testimony *itself* to do so.

The Court agreed that King had raised sufficient issues of material fact to overcome the presumption that her indictment was proof of probable cause.

The Court reversed the decision against King and allowed the case to go forward on both state and federal claims.

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[136] No. 14-9496 (U.S. Mar. 21, 2017),

[137] *See, e.g.*, Sykes, 625 F.3d at 315 ("[H]olding Sgt. Anderson liable for all reasonably foreseeable consequences of his initial misdeeds finds support in the Supreme Court's decision in Malley v. Briggs, 475 U.S. 335. In Malley, the Supreme Court made clear that normal causation principles apply to 42 U.S.C. § 1983 actions by stating that if an 'officer caused [a] plaintiff[] to be unconstitutionally arrested by presenting a judge with a complaint and a supporting affidavit [that] failed to establish probable cause,' *id.* at 337, it is 'clear' that the argument that 'the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest' would be 'inconsistent with [its] interpretation of § 1983,' *id.* at 344 n.7.").

Sanders v. Jones, 6th Cir. 2017

FACTS: In October, 2012, Deputy Jones (Decatur County SD) was working as a drug task force member. The DTF regularly used Cis to further investigations. In May, 2013, the DTF used a CI, who identified Sanders as a dealer. Another detective introduced Jones to the CI, and attested to his credibility in other investigations, but he did not have ties to the Decatur area. The CI was paid and had no current drug investigation, although he had a history. The CI made contact with Amy (Amanda Ramey), who was another target in the investigation and was Sanders' roommate. The CI made a buy from Amy (although he didn't know her real identity) and gave a description to the officers. Upon investigation, Jones learned it might be Sanders. He showed the CI her OL photo and he identified her.

Jones wrote up a report, but did not indicate how the suspect was identified as Sanders, nor did he note there was poor quality video of the transaction. Jones did not discuss it with the prosecutor until the morning it was presented to the grand jury, and it was unclear whether Williams knew of the video. Jones testified there was video at the Grand Jury, but did not elaborate that it was poor quality. Sanders was indicted. She turned herself in, posted bond and was released. The charges were ultimately dismissed, however, as there had been a misidentification and the woman in the photo was not Sanders. Since Jones acknowledged the the video footage didn't look like Sander, a "jury could conclude that he knowingly or recklessly misrepresented the identity of the person who sold the CI drugs." He could not rely on the CI because he had not provided any "substantial supporting evidence" of reliability.

Sanders filed suit against Jones under 42 U.S.C. §1983, for false arrest, false imprisonment and malicious prosecution, under both state and federal claims. Jones claimed absolute immunity for his grand jury testimony. Later, in a deposition, Jones was showed a screenshot from the video and agreed that the female in the video was not Sanders. The trial court first denied the immunity, reasoning that his "grand jury testimony did not automatically insulate him from Sanders's malicious prosecution claim because her claim was premised not only on Jones's grand jury testimony but also on his investigative conduct leading up to the grand jury." He had no absolute immunity for his investigative acts. The court also rejected a qualified immunity argument, noting that in such a case, the jury must determine if it was objectively reasonable' for the officer to believe that the arrested individual was the person sought."[138]

Jones appealed.

ISSUE: Does a witness that provides recklessly false information to a prosecutor (influencing a prosecution) have immunity?

HOLDING: No

DISCUSSION: The Court looked first at the absolute immunity claim. The Court noted that the "Sixth Circuit's current version of § 1983 malicious prosecution began with the Supreme Court's decision in Albright v. Oliver, where the Court held that a claimed constitutional right to be free

[138] (citing Webb, 789 F.3d at 663).

from prosecution except upon probable cause must be brought under the Fourth Amendment rather than under substantive due process."[139]

Finally, in "Sykes v. Anderson, the Sixth Circuit outlined four elements that a plaintiff must prove to succeed on a § 1983 malicious prosecution claim: (1) a criminal prosecution was initiated against the plaintiff, and the defendant made influenced, or participated in the decision to prosecute; (2) there was a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty, as understood under Fourth Amendment jurisprudence, apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor."[140] However, as a rule, an indictment determines probable cause.[141]

An exception exists when the defendant ""knowingly or recklessly present[s] false testimony to the grand jury to obtain the indictment."[142] The roots of Webb occur, however, from a case that involved a determination of probable cause made by a judge in a prior criminal hearing, not a grand jury. Later cases extended the reasoning to grand jury proceedings.

This expansion "expansion occurred largely under the influence of the §1983 cause of action for false arrest. Under the false arrest standard, a police officer may be liable for false arrest, even if the officer had a judicially-secured warrant, where the plaintiff establishes: "(1) a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the allegedly false or omitted information was material to the finding of probable cause."[143] This two-pronged test has also become the standard for demonstrating a lack of probable cause in malicious prosecution cases where either a grand jury issued an indictment,[144] or a judge made a finding of probable cause in a preliminary hearing,[145]

However, this puts the situation in tension with Rehberg in which the Court had held that ""grand jury witnesses should enjoy the same immunity as witnesses at trial. This means that a grand jury witness has absolute immunity from any § 1983 claim based on the witness' testimony."[146] This, of course, includes perjured testimony.[147] The Court warned that "this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution."[148] The Rehberg Court also found no reason to distinguish police-officer witnesses from lay witnesses." Assuming that what Sanders alleged was true,[149] she cannot use the grand jury testimony. However, she argued that the basis of the claim is his "allegedly false police report, which was provided to the prosecutor's office for preparation of the indictment."

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[139] 510 U.S. 266, 274-75 (1994),
[140] 625 F.3d 294 (6th Cir. 2010),
[141] Higgason v. Stephens, 288 F.3d 868, 877 (6th Cir. 2002). This rule originates from Ex parte U.S., 287 U.S. 241 (1932),
[142] Webb, 789 F.3d at 660.
[143] Vakilian v. Shaw, 335 F.3d 509, 517 (6th Cir. 2003) (applying this
standard to Fourth Amendment claims of unlawful arrest and malicious prosecution).
[144] *see* Webb, 789 F.3d at 660; *Robertson* 753 F.3d at 616;
[145] *see* Peet v. City of Detroit, 502 F.3d 557, 566 (6th Cir. 2007); Gregory, 444 F.3d at 758; Vakilian, 335 F.3d at 517.
[146] Rehberg, 132 S. Ct. at 1506.
[147] *See* Briscoe v. LaHue, 460 U.S. 325 (1983).
[148] Rehberg, 132 S. Ct. at 1506.
[149] Buckley v. Fitzsimmons, 509 U.S. 259 (1993).

On the surface, absolute immunity for Jones's grand jury testimony poses problems for two elements of Sanders's § 1983 malicious prosecution action: (1) influence over or participation in the decision to prosecute, and (2) lack of probable cause. Rehberg makes clear that Sanders cannot use Jones's grand jury testimony to prove either of these elements.[150] That is, how can Sanders, or any other malicious-prosecution plaintiff, prove a defendant influenced or participated in a grand jury's decision to prosecute without relying on the defendant's sole interaction with the grand jury—that is, the grand jury testimony? Similarly, how can a plaintiff show a lack of probable cause—without flouting Rehberg—when the only apparent exception to the indictment's presumptive proof of probable cause is false grand jury testimony?

Using Angel v. Kentucky[151], however, the Court noted it could affirm the trial court on any supportable basis, and elected to "examine the tensions between Rehberg and our malicious prosecution cause of action to determine whether malicious prosecution remains a viable claim where a plaintiff was indicted by a grand jury given that Rehberg lends absolute immunity to grand jury testimony. Plaintiff was indicted by a grand jury given that Rehberg lends absolute immunity to grand jury testimony.

The apparent conflict between Rehberg immunity and the first element—influence over the decision to prosecute—is easily overcome. "To be liable for 'participating' in the decision to prosecute, the officer must participate in a way that aids in the decision, as opposed to passively or neutrally participating."[152] There must be "some element of blameworthiness or culpability in the participation," as "truthful participation in the prosecution decision is not actionable."[153] In Webb, we relied on false grand jury testimony as evidence of participation in the decision to prosecute. Clearly, that approach is not supportable under Rehberg when the defendant raises the defense of absolute immunity.[154] But absolute immunity was not raised in Webb. Because absolute immunity is an affirmative defense that may be waived,[155] the Webb court was not required to address the effect of Rehberg if the defendants did not invoke absolute immunity. Therefore, we are not bound by Webb because in this case the defense of absolute immunity was clearly raised by Jones's motion for summary judgment.

Our precedent, however, confirms that false grand jury testimony is not the only way to prove participation in the decision to prosecute. A defendant can also influence or participate in the decision to prosecute by prompting or urging a prosecutor's decision to bring charges before a grand jury in the first place. Indeed, we held in Webb that false statements to the prosecutor constituted participation in the decision to prosecute, especially where the prosecutor indicated that he relied on those falsehoods in pursuing the indictment.[156] We have reached the same conclusion in cases involving a preliminary hearing where the defendant-officer made false statements to the prosecutor but either did not testify at the preliminary

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[150] Rehberg, 132 S. Ct. at 1506.
[151] 314 F.3d 262, 264 (6th Cir. 2002)
[152] Webb, 789 F.3d at 660 (quoting Sykes, 625 F.3d at 308 n.5).
[153] Johnson, 790 F.3d at 655.
[154] *See* Rehberg, 132 S. Ct. at 1506 ("[T]his rule [of absolute immunity] may not be circumvented . . . by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of prosecution.").
[155] Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986).
[156] Webb, 789 F.3d at 663-64, 666 (holding that various defendants participated in the decision to prosecute because the prosecutor relied on their false statements in deciding to pursue an indictment).

hearing,[157] or had absolute immunity for his testimony at the preliminary hearing,[158] In other words, false testimony before the judicial decision-maker—grand jury or judge—is not necessary to show influence or participation over the decision to prosecute. False statements to the prosecutor can suffice.[159]

As a result, Sanders could demonstrate the first element of her claim via the allegedly false statements in Jones's police report. The district attorney's office indisputably received and used the report in deciding to submit the case to the grand jury. The parties agree that this report, in tandem with the CI's identification, "formed the basis for [Sanders's] indictment." In fact, there is no evidence that the prosecutor received any information other than Jones's police report in deciding to pursue the indictment. Therefore, assuming Sanders can demonstrate that Jones's police report contains knowing or reckless falsehoods, she need not resort to Jones's grand jury testimony to prove that he influenced or participated in the decision to prosecute.

Moving to the next prong, however, showed another tension. Sixth Circuit precedent indicates that a plaintiff who was indicted by a grand jury can overcome the presumption of probable cause only by evidence that the defendant made false statements to the grand jury. False statements made in a police report or to a prosecutor do not satisfy this test. This is because false statements in a police report or made to a prosecutor cannot, on their own, be material to the *grand jury's* finding of probable cause. False statements could affect the grand jury's determination of probable cause only if introduced through grand jury testimony, and if that testimony is by the defendant, he is absolutely immune under Rehberg. Therefore, while Rehberg does not provide Jones absolute immunity for his police report, the police report standing alone cannot rebut the grand jury's finding of probable cause. In other words, Rehberg effectively defeats Sanders's malicious prosecution claim based on the allegedly false police report because she cannot overcome the presumption of probable cause without using Jones's absolutely immune grand jury testimony.

Rehberg itself lends support to this outcome. Rehberg specifically forbids attempts to circumvent absolute immunity "by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution."[160] The Court explained that it wanted to prevent civil plaintiffs from "simply reframe[ing] a claim to attack the preparation instead of the absolutely immune actions themselves."[161] It then noted that in most cases, "the witness and the prosecutor conducting the investigation engage in preparatory activity, such as a preliminary discussion in which the witness relates the substance of his intended testimony,"

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[157] Sykes, 625 F.3d at 317 (holding that the defendant who did not testify at preliminary hearing "influenced or participated in the ultimate decision to prosecute the Plaintiffs by way of his knowing misstatements to the prosecutor"),

[158] *see* Hinchman, 312 F.3d at 205 (denying qualified immunity to officers who made false statements to prosecutors and other officers, even though they had absolute immunity for their testimony at the preliminary hearing).

[159] *Cf.* Skousen v.Brighton High Sch., 305 F.3d 520, 529 (6th Cir. 2002) (holding that the defendant officer did not make the decision to prosecute the plaintiff where he simply forwarded his police report and medical report to the prosecutor's office where there was no proof that he was consulted regarding the decision to prosecute and there was no proof that the information in the reports was untruthful).

[160] Rehberg, 132 S. Ct. at 1506.

[161] *Id.* (citing Buckley, 509 U.S. at 283.

and a § 1983 claim could not survive by challenging these preliminary discussions rather than the grand jury testimony itself.

But, in Rehberg, the Court acknowledged that absolute immunity does not extend to all activity that a witness conducts outside the grand jury room. It "specifically mentioned that falsifying affidavits and fabricating evidence would constitute unprotected acts." In this case, her claim was that he "misled the prosecutor and the grand jury" – not that he falsified evidence.

Although the Court acknowledged the result was harsh, it must reverse the §1983 case. It noted, however, that "as with perjurious trial testimony, the possibility of prosecution for perjury provides a sufficient deterrent."

42 U.S.C. §1983 – DISCOVERY

Scadden v. Officer Werner / Twardesky / Viars, 2017 WL 384874 (6th Cir. 2017)

FACTS: In January, 2013, "Scadden's tenant brought illegal drugs into Scadden's house, prompting Scadden to order him to leave." Mrs. Scadden tried to intervene. The tenant called for the police, and when they arrived, "they allegedly broke down the front door, entered with their guns drawn, and told Scadden to 'get the **** on the ground." At some point, before he could comply, an officer did a flying kick, knocking him to the ground unconscious. He suffered severe injuries.

Scadden ultimately pled guilty to several charges, admitting the following: "that he had two Vicodin pills in his pocket without a prescription when he was arrested; that he failed to comply with the officers' orders to get to the ground enough; and that he grabbed his wife by her sweater in anger."

Scadden filed suit against the officers involved, arguing excessive force in the arrest. During the initial discovery period, the defendants "had trouble getting Scadden to comply with their request to answer interrogatories and produce documents, they moved the district court to compel his response." Scadden complied and the discovery deadline was adjusted. However, that deadline came and went, and there was no effort made to depose the officers or perform other discovery tasks. Before the motion deadline, the officers moved for dismissal and summary judgement. Given an opportunity to respond, Scadden claimed to still be in discovery.

At the hearing a few months later, Scadden's counsel failed to appear. Eventually, the court granted the officers' motion to dismiss. Scadden objected, making a motion for reconsideration, arguing that they needed more time for discovery and that discovery had continued past the original deadline, informally. The Court denied the motion and Scadden appealed.

ISSUE: Is it the plaintiff's responsibility to "prosecute" a case?

HOLDING: Yes

DISCUSSION: Scadden made several arguments, but the Court agreed that all failed, "because they either ignore his responsibilities in prosecuting his case or misstate the law." The Court noted that he never made a motion for an extension of the discovery, and even had he done so, it was still discretionary. The first time he said he was even pursuing it was in that final motion. Before the deadline, the officers had to force him to cooperate with discovery. "Overall, Scadden had ample opportunity for discovery – he just never used it."

The officers met their requirements in making their summary judgement, and Scadden did not, as he provided no facts to support his claim. Scadden argued that he could not identify the officer who kicked him, shifting the burden to the officers. [162] The Court noted that the framework had not extended to excessive force claims.[163] The Court noted that "no one stonewalled Scadden; he simply never asked any questions."

The Court affirmed the dismissal of the action.

42 U.S.C. 1983 – TERMINATION

Dibrito v. City of St. Joseph, 2017 WL 129033 (6th Cir. 2017)

FACTS: DiBrito had a long career with the FBI, and then began working for St. Joseph, Michigan as the deputy director of the Public Safety Director. In that position, he reported to Clapp, the director. DiBrito began keeping notes on actions that clap engaged in, and with which DiBrito disapproved. As an example, he took issue with Clapp's disposition of a firearm that had come into the possession of the agency, and with a dispute over a situation with an individual with the Fire Department. In the latter instance, Clapp threatened to fire DeBrito if the alleged situation was true.

In the same time frame, Clapp met with an officer, Vaught, involved in the firearms situation, and he claimed that DiBrito was hired because he had been investigating the former city manager, and that he dropped the investigation because he got the job, in an exchange. Vaught told DiBrito about the comment, and DiBrito filed a formal complaint about the firearms situation with the City Manager, Lewis. He mentioned the comments to Lewis the next day.

Upon investigation, it was determined that no crime was committed in the firearms situation, and Lewis directed DiBrito to draft a policy on the issue for the future. Concerned about the situation, Lewis hired Lloyd to a third party for investigation, and as a result, Clapp was suspended for five days, and DiBrito terminated. DiBrito filed suit, arguing First Amendment and Due process issues. The Trial court awarded summary judgement to the city, and DiBrito appealed.

ISSUE: Is there some limitation on the First Amendment rights of public employees?

HOLDING: Yes

[162] Dubner v. City & Cty. Of San Francisco, 266 F.3d 959 (9th Cir. 2001).
[163] Burley v. Gagacki, 834 F.3d 606 (6TH Cir. 2016).

DISCUSION: DiBrito argued that his termination violated his First Amendment protections. In making such a retaliation claim, a party must first show that they "engaged in constitutionally protected conduct," "suffered an adverse action sufficient to deter a person of ordinary firmness from engaging in such conduct, and that "the adverse action was motivated at least in part by the plaintiff's protected conduct."[164]

The court noted that government services, by necessity, causes certain limitations on the freedom of its employees.[165] That does not mean, however, that such employees "forfeit all their First Amendment rights simply because they are employed by the state or municipality."[166]

To balance, the Supreme Court had established a three part evaluation process, requiring the following:

> (1) That h[is] speech was made as a private citizen, rather than pursuant to h[is] official duties; (2) that h[is] speech involved a matter of public concern; and (3) that h[is] interest as a citizen in speaking on the matter outweighed the state's interest, as an employer, in promoting the efficiency of the public services it performs through its employees."

Look at the facts, DiBrito argued both of his statements were made ad a private citizen about a matter of public concern. The Court disagreed, and found that both statements were made either pursuant to official duties or as an internal employee dispute, instead.

With respect to the first, the Court looked to Lane v. Franks, the Court agreed that it was a narrowly tailored situation, as to whether the speech is "ordinarily within the scope of an employee's duties." In his position, he was the second highest law enforcement officer in the city and regularly worked as such. His issue with the firearm involved a potential criminal complaint which made it pursuant to his official duties.

And even if it was made as a private citizen, it would still not be protected unless it was a matter of public concern.[167] Since the complaint about Clapp's possibly defamatory comments, was an employment grievance and not a matter that implicated corruption or misuse of public monies, for example, as such, it is not protected on that issue, either.

The court agreed that the termination was lawful and not a violation of due process, and dismissed DiBrito's claim.

TRIAL PROCEDURE / EVIDENCE – BRADY

Carter v. City of Detroit, 2017 WL 395977 (6th Cir. 2017)

[164] Handy-Clay v. City of Memphis, 695 F.3d 531 (6th Cir. 2012).
[165] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[166] Handy-Clay, supra.
[167] Connick v. Myers, 461 U.S. 138 (1983).

FACTS: On October 24, 1974, a pregnant college student was sexually assaulted at Wayne State University. During the investigation, a number of usable prints were obtained. Carter was identified by witnesses as a possible suspect, and the victim identified him in a lineup. He was subsequently charged with the sexual assault and associated robbery.

It was determined that the prints were not Carter's. He denied being the assailant. Carter was convicted at a bench trial. In 2004, the Innocence Clinic took up his case. The prints were matched to another individual, a serial sexual predator. Carter was released after 35 years in prison. Carter filed suit under 42 U.S.C. 1983 against a number of officers, claiming that their failure to disclose the non-match violated his rights under Brady. (It was also noted that Carter was actually in jail on the day of the attack, but that information was never placed before the court.)

The trial court granted the defendants' motions for summary judgement. Carter appealed.

ISSUE: Are officers only responsible of getting exculpatory information to the prosecutor?

HOLDING: Yes

DISCUSSION: The Court noted that officers fulfill Brady when they provide the prosecutor with the potentially exculpatory information.[168] In this case, there was no indication that officers failed to disclose, although the prosecutor did not use the evidence at trial.

The Court upheld the summary judgement.

TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE

Dorsey v. Cook, 2017 WL 395977 (6th Cir. 2017)

FACTS: Dorsey was charged with rape and related charges. At the time of the trial, the victim had died, so Mahan, a SANE, testified as to what she had learned during her exam. During that interview, the victim had specifically identified Dorsey.

Dorsey was convicted and appealed. Through later appeals, he argued that his Confrontation Clause rights were violated by Mahan's testimony.

ISSUE: Are dual purpose statements testimonial?

HOLDING: As yet, unclear

[168] D'Ambrosio v. Marino, 747 F.3d 378 (6th Cir. 2014).

DISCUSSION: Dorsey argued again that his Confrontation rights were violated. The Court noted that the clause "prohibits the admission of testimonial statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination."[169]

In this case, the Court noted that it had not yet been addressed as to whether a dual purpose statement – for both medical treatment and diagnosis as well as prosecution, was in fact testimonial. As such, it denied Dorsey habeas relief.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

U.S. v. Reynolds, 2017 WL 1179371 (6th Cir. 2017)

FACTS: On December 13, 2013, a Knox County KY detective engaged a paid CI to purchase narcotics from Reynolds, while wearing a wire. 10 hydrocodone tablets were obtained. The next month, the CI was able to purchase 10 more pills and a handgun.

Reynolds was charged. At trial the recordings were played, but he argued, never explicitly showed him with the drugs or the gun. The CI did not testify, it was suggested that he may have died. The prosecutor asked the detective about what had triggered the investigation, and he stated he had information that Reynolds was involved in selling illegal narcotics. The Court agreed the question was proper to indicate why the detective started the case. He responded to other questions about Reynolds as well, including how he learned where he lived.

Reynolds was convicted and appealed.

ISSUE: May officers provide hearsay information as background?

HOLDING: Yes

DISCUSSION: The Court noted that the detective's information was not used to prove the truth of the matter asserted (as required for legal hearsay) but "rather as background information to explain how and why law enforcement was investigating defendant." The CI was used solely to gather evidence. Further, information about Reynolds' resident was properly admitted for the same reason as before, as background information. One statement was questionable, that people were selling narcotics from that house, but the court noted that question was posed by the defense.

The Court affirmed his conviction.

U.S. v. Hayworth, 2017 WL 927782 (6th Cir. 2017)

[169] Crawford v. Washington, 541 U.S. 36 (2004).

FACTS: On January 30, 2014, Hayworth robbed a Tennessee Burger King, with his face covered and carrying an Airsoft pistol. A conspirator, Chudley, an employee, opened the back door, ostensibly to take out the trash, letting Hayworth in. Hayworth rushed in, obtained $3,300 in cash, and briefly struggled with Chudley, to make him appear to be an innocent employee. He fled in his sister's car, wrecking it quickly. He was ejected and ran, and got "his hands on" another vehicle. He met with Popejoy to "discuss his predicament, and the pair sold one of the speakers in the second vehicle. An FBI agent spotted they pair and recognized Hayworth, and another chase ensued. Again Hayworth got away and dropped off Popejoy. A manhunt began, with police swarming the scene.

McGuire and Gulley were outside in the neighborhood when Hayworth emerged and ran at them, demanding keys. The women tried to run but Gulley, nine months pregnant, fell. McGuire had no keys but Gulley did, in her hand, and Hayworth wrestled her for them, "jabbing her in an attempt to gain control." McGuire pleaded for Gulley. Hayworth got the keys and found it, using the key fob. As he drove off, Gulley pleaded for him to release her dog, in the vehicle, and he did so.

As he fled the scene, he again passed the same FBI agent, and again, lost control of the vehicle and wrecked it. He fled again, but "following the hue and cry of bystanders, police tracked Hayworth to an abandoned house and found him hiding under a couch."

Hayworth was charged under the Hobbs Act for robbery, carjacking and related charges. He was convicted and appealed.

ISSUE: Does federal carjacking including "conditional intent?"

HOLDING: Yes

DISCUSSION: The Court looked first at the elements of carjacking. At issue was whether the intent to cause harm element in the federal charge could also "encompass conditional intent." In other words, it can be based on whether the intent was merely to cause harm IF the subject resisted. He argued that he had no weapon and even let the dog out, demonstrating that he "merely wanted the keys." The Court noted that the testimony "showed that Hayworth struck and struggled with a nine-months pregnant woman, who had already fallen to the ground, until she relinquished her keys," and that certainly he was aware of her condition. The Court upheld that issue.

Hayworth also argued that Gulley's testimony was unduly prejudicial. The Court noted that "when a defendant commits a heinous act, he cannot but expect that the horrible details will be presented where they are central to the prosecution and elements of the crime." Providing the jury was properly instructed on the use of such information, and the court agreed it was, that information is properly admitted.

The Court upheld his convictions.

TRIAL PROCEDURE / EVIDENCE – EXCULPATORY

Thomas v. Westbrooks, 849 F.3d 659 (6th Cir. 2017)

FACTS: Thomas was charged with a state and federal murder charge, with respect to the murder of an armored truck driver in Memphis. Jackson was the pivotal witness and placed Thomas at the scene. Following the federal trial and before the state murder prosecution, the FBI paid Jackson $750 as part of a gang-related crime initiative. This was never revealed to the state prosecution, although the knowledge of it must be "imputed" to them. It was not disclosed in the state prosecution, and this was "particularly egregious" because Jackson put forth a "high-minded reason" for her testimony – that it was the "right thing to do." When Jackson denied receiving any payment, the prosecutor failed to correct the record.

Thomas appealed over several claims, and was denied. He appealed.

ISSUE: Is a defendant entitled to know if a witness is paid?

HOLDING: Yes

DISCUSSION: Thomas argued that his due process rights were violated when he was not informed of the payment. The Court agreed that "a prosecutor's suppression of evidence violates a criminal defendant's due process rights when the evidence is favorable to the accused and material either to guilt or punishment."[170] To qualify, it must be proven that the evidence is favorable to the defendant, that the state suppressed it, "either purposefully or inadvertently," and that the action resulted in prejudice." Evidence is material when it is considered in toto with other evidence, and deprives the defendant of a fair trial.[171]

The Court looked to Robinson v. Mills and agreed that Jackson's testimony was pivotal to the case against Thomas. In fact, she herself had committed criminal acts and "if the jury had been presented with evidence of an unusual payment to an individual who can be fairly characterized as an accessory after the fact," it may have disregarded her testimony. Even though she was extensively cross-examined and her motives explored, impeachment on pecuniary basis is different.

The Court reversed Thomas's conviction.

TRIAL PROCEDURE / EVIDENCE – WIRETAP

U.S. v. Brown, 2017 WL 360554 (6th Cir. 2017)

FACTS: In 2011, during an investigation focusing on Hadley, the suspected kingpin in a drug ring, officers used a variety of techniques. Officers received a wiretap and picked up a

[170] Brady v. Maryland, 373 U.S. 83 (1963).
[171] Montgomery v. Bobby, 654 F.3d 668 (6th Cir. 2011); Kyles v. Whitley, 514 U.S. 419 (1995).

phone number for a CI associated with Brown. Recordings of conversations between Hadley and Brown were captured.

Brown was charged as well. Brown argued against the wiretap, arguing that it was done without necessity, and done unlawfully. He later argued the wiretap application did not identify him, either. He was denied and ultimately convicted. He then appealed.

ISSUE: Must officers name all possible parties to conversations under a wiretap warrant?

HOLDING: No

DISCUSSION: The Court agreed that pursuant to U.S. v. Donovan, the failure to identify all possible parties to a wiretapping did not invalidate the information.[172] As such, the wiretap information was property admitted.

[172] 429 U.S. 413 (1977).

TABLE OF CASES